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IN THE SUPREME COURT OF THE STATE OF FLORIDA

G. C. WESTERVELT,

Appellant,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT, A FLORIDA DRAINAGE CORPORATION, ET AL.,

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, the appellant, G. C. Westervelt, at and upon the presentation of his petition for the allowance of an appeal to the Supreme Court of the United States to review the final decree and judgment entered in the Supreme Court of the State of Florida on the 8th day of December, 1950, presents this statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in question.

Jurisdiction

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States to review the judgment or decree by appeal is Title 28, United States Code, Sections 1257 (2) and 2101 (c).

The following cases are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct

appeal: *Kunz* v. *New York*, — U. S. —, 71 Sup. Ct., 312 (314), *Niemotko* v. *Maryland*, — U. S. —, 71 Sup. Ct., 325 (327), *Dean Milk Co.* v. *Madison*, — U. S. —, 71 Sup. Ct. 295 (296), *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 70 Sup. Ct. 806, *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, — U. S. —, 71 Sup. Ct. 215, *Ward* v. *Krinsky*, 259 U. S. 503, 42 Sup. Ct. 529, *Near* v. *State of Minnesota ex rel. Olson*, 283 U. S. 697, 51 Sup. Ct. 625, *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 62 Sup. Ct. 1168, *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 56 Sup. Ct. 619, *Louisiana R. etc. Co.* v. *New Orleans*, 235 U. S. 164, 35 Sup. Ct. 62, *Mobile, etc. R. Co.* v. *Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968.

Statutes Involved Cited and Summarized

The statutes of the State of Florida the validity of which is involved are Chapters 17,072 and 17,073, Laws of Florida, General Acts of 1935.

Chapter 17,072 may be found at page 671, Laws of Florida, 1935, General Laws, Volume 1.

Chapter 17,073 may be found at page 672, Laws of Florida, 1935, General Laws, Volume 1.

Chapter 17,072 provides that the Board of Supervisors of the Istokpoga Consolidated Sub-Drainage District are authorized and empowered to adjust by reduction or otherwise all annual levies of drainage district taxes theretofore made or authorized, that the lien existing against the land for assessments and levies theretofore made shall in no wise be affected or impaired by any adjustment or reduction so made, but that such liens shall remain in full force and effect to the extent of such adjusted assessments and shall be enforceable as provided in the Act creating the Istokpoga Consolidated Sub-Drainage District, which Act was Chap-

ter 14,736, Laws of Florida, 1931, General Laws, Volume 1, page 359.

Chapter 17,073 provides that the Board of Supervisors of the Istokpoga Consolidated Sub-Drainage District shall, each year beginning with the year 1931, determine, order and levy the amount of annual installment of total tax theretofore levied by the previously established Istokpoga Sub-Drainage District, which annual levy shall be in such amount as may be necessary to pay the interest and create a sinking fund to pay the principal on all outstanding bonds, or other indebtedness, including any bonds outstanding in the name of the Istokpoga Sub-Drainage District, and in an amount sufficient to take care of maintenance or improvements in the district, and costs or expenses of the district, provided, that the Board of Supervisors in determining and making the levy shall take into consideration the progress that has been made in completing the plan of reclamation, and shall lay a larger percent of the annual levy against those lands which, up to the date of such levy, have received a greater portion of the benefits derived from partial completion of the plan of reclamation than that laid against those lands which have received a smaller portion of such benefits, provided, further, that in making the annual levies for the purpose of taking care of bonds or other obligations, still outstanding, issued in Istokpoga Sub-Drainage District, prior to the adoption of Chapter 14,736, Laws of Florida, Acts of 1931, creating the Consolidated District, the Board of Supervisors shall confine such levy to property situated within the old Istokpoga Sub-Drainage District, and such levy shall be based upon the assessment of benefits made in the old Istokpoga Sub-Drainage District, which amount shall become due and collectible during each year and at the same time the state and county taxes are due and collectible

Chapter 17,073 also provides that, in the event all of the Istokpoga Sub-Drainage District obligations then outstanding are not taken up and paid for as therein provided or are not exchanged for bonds or notes of Istokpoga Consolidated Sub-Drainage District as therein provided, such remaining outstanding Istokpoga Sub-Drainage District obligations shall be the binding obligation of Istokpoga Consolidated Sub-Drainage District, and shall stand upon equal footing with bonds or other obligations of Istokpoga Consolidated Sub-Drainage District, provided, the levy for payment of such obligations shall be confined to the district from which the same were issued, that is, that the levy for payment of Istokpoga Sub-Drainage District bonds or indebtedness shall be against the territory theretofore embraced in the Istokpoga Sub-Drainage District.

Chapter 17,073 further provides that all bonds and notes issued by the Board of Supervisors of the Istokpoga Consolidated Sub-Drainage District and all bonds or indebtedness that shall remain outstanding that were issued by Istokpoga Sub-Drainage District shall be secured by a lien upon lands or other property of the district, and the Board of Supervisors shall see to it that a tax is levied annually and collected so long as may be necessary, for such amount as is necessary, to pay any bonds issued or obligations contracted under its authority, and any bonds issued or obligations contracted under authority of the Istokpoga Sub-Drainage District, and that in the levy for obligations of Istokpoga Sub-Drainage District the levy shall be made on property in that district.

The Circuit Court for Highlands County, Florida, in its final decree, construed Chapters 17,072 and 17,073 as voiding and cancelling out the annual drainage district tax levies which had already been made for the years 1926, 1927 and 1928, by the Board of Supervisors of Istokpoga Sub-drain-

age District, based on the assessment of benefits duly and regularly made by the commissioners appointed by the Circuit Court of Highlands County for that purpose, which assessment of benefits had been confirmed by a decree of the Circuit Court and validated by the Legislature of the State of Florida, and as requiring that the Board of Supervisors of Istokpoga Consolidated Sub-Drainage District should "adjust by reduction or otherwise all annual levies" of drainage district taxes made before May 14, 1935, and that because of such legislatively required adjustment and legislative cancelling out of existing tax liens for the years 1926, 1927 and 1928, the liens of the annual drainage district taxes for those years cannot be enforced.

Upon the entry of the final decree of the Circuit Court, so construing and applying these statutes, G. C. Westervelt, the plaintiff in the Circuit Court, appellant here, filed a petition for rehearing in the Circuit Court, upon the grounds, among others, that the statutes, as so construed and applied, are unconstitutional and void, as impairing contract obligations and as denying due process.

Rehearing was denied.

The Florida Supreme Court affirmed.

Justice Thomas dissented.

Opinions Below and Controlling Dates

The date of the final decree and judgment of affirmance by the Florida Supreme Court is December 8, 1950. A copy is attached as Appendix A.

The date upon which the application for appeal is presented is February 21st, 1951.

The opinion filed in the Florida Supreme Court on December 8, 1950, is reported in 49 Southern Reporter, 2nd Series, 341, the Southern Reporter being now the official reports of the Florida Supreme Court. A copy of the opinion is attached as Appendix B.

The original judgment of affirmance by the Florida Supreme Court was rendered August 1, 1950, but a timely petition for rehearing and a motion for modification of the opinion were filed, and on December 8, 1950, the opinion filed August 1, 1950, was withdrawn and the rehearing was denied. A copy of the opinion filed on August 1, 1950, is attached as Appendix C.

A copy of the Final Decree entered in the Circuit Court for Highlands County, Florida, including the introductory portion, the findings, and the decree proper, is attached as Appendix D.

A copy of the order denying rehearing in the Circuit Court is attached as Appendix E.

Earlier opinions of the Florida Supreme Court are reported as follows:

Westervelt v. *Istokpoga Consolidated Sub-Drainage District,* 158 Florida 214, 28 So. 2nd 859.

Istokpoga Consolidated Sub-Drainage District v. *Westervelt,* 160 Fla. 778, 35 So. 2nd 15.

Westervelt v. *Istokpoga Consolidated Sub-Drainage District,* 160 Fla. 535, 35 So. 2nd 641.

A copy of the earliest of these opinions is attached as Appendix F.

The second of these opinions is a memorandum simply denying a rehearing which had been petitioned for.

A copy of the third opinion is attached as Appendix G.

Statement of the Case

The Istokpoga Sub-Drainage District was organized under the General Drainage Law of Florida, the decree of the Circuit Court establishing the district being dated September 9, 1924.

The General Drainage Law is set out in Sections 1098 to 1152, inclusive, Revised General Statutes of Florida, 1920, Volume 1, pages 656-700.

The General Drainage Law, with amendments, became Sections 1451 to 1522, inclusive, Compiled General Laws of Florida, 1927, Volume 1, pages 495-541.

The General Drainage Law, with amendments, subsequently became Sections 298.01 to 298.81, inclusive, Florida Statutes, 1941, Volume 1, pages 1092-1119.

The creation of the Istokpoga Sub-Drainage District and all things done in and about or leading up to its creation were validated and confirmed by Chapter 10,700, Laws of Florida, Special Acts of 1925, Volume 2, page 2113.

Section 1107, Revised General Statutes of Florida, 1920, Volume 1, pages 663-664, Section 1460, Compiled General Laws of Florida, 1927, Volume 1, pages 502-503, authorizes the board of supervisors of any drainage district organized under the General Drainage Law to levy a uniform tax of not exceeding 50 cents per acre for organizational and other preliminary expenses.

This section also authorizes the board of supervisors to borrow money to meet emergencies, at a rate of interest not exceeding 8 per cent, and to issue negotiable notes or bonds therefor.

It further authorizes them to issue to any person or persons, performing work or service or furnishing anything of value in the organization of the district, negotiable evidences of debts, bearing interest at not exceeding 6 per cent.

It still further authorizes them, in the event any installment of taxes has been levied for the payment of any obligation of any district, to issue notes bearing a rate of interest not exceeding 8 per cent, payable out of such installment of taxes.

The Florida Legislature at its regular 1925 session, enacted Chapter 10,692, Laws of Florida, Special Acts of 1925, Volume 2, pages 2098-2100.

Section 1 of Chapter 10,692 authorizes the board of supervisors of Istokpoga Sub-Drainage District, upon the adoption of a plan of reclamation for the district, to purchase all necessary machinery for doing the work, and commence the prosecution of the work of reclaiming the lands in the district, and to prosecute it until the full plan of reclamation is completed and complied with, and to that end and for that purpose, the board of supervisors are authorized and empowered to borrow money and issue negotiable promissory notes of the district, to draw interest at not exceeding 6 per cent, and to execute notes of the district in payment for any machinery or labor used or performed or purchased in connection with the carrying out of the plan of reclamation.

This section also provides that any notes so issued are declared to be the valid, legal, binding obligation of the district.

Section 2 of Chapter 10,692 authorizes and empowers the board of supervisors, at their discretion, upon the adoption of a plan of reclamation for the district, to immediately enter into a contract for the completion of the work, and to borrow money for the purpose of paying for such work, and to execute and deliver promissory notes of the district for money so borrowed, and to execute and deliver direct to the purchaser the promissory notes of the district for the work done by such contractor in pursuance of the plan of reclamation.

This section also provides that, in the event the notes of the district are issued for the purposes mentioned, they shall be the binding legal obligations of the district and they are thereby validated and confirmed.

A plan of reclamation was adopted and commissioners were appointed to assess the benefits to the lands in the

Istokpoga Sub-Drainage District by reason of the execution of the plan of reclamation.

The commissioners assessed the benefits and made their report of such assessment, which report, after notice, was confirmed by the Circuit Court.

Chapter 11,539, Laws of Florida, Acts of 1925, Extraordinary Session, page 1213, validated the assessment of benefits and declared the amount assessed against each parcel of land to be a lien against the land for the amount of such assessment.

Such an act has the force and effect of "a legislative determination of the benefits assessed against the lands of the appellees, and that such benefits exceed the amount of the assessments made and were properly entered against the lands." *Dover Drainage District* v. *Pancoast,* 102 Fla. 267, 135 So. 518.

The Board of Supervisors, at a meeting held on January 28, 1926, determined that ten per cent of the total benefit assessment should be levied as a tax against the land in the district, plus an additional amount of ten per cent of the amount so levied, the aggregate amount of tax necessary to be levied, in the opinion of the board, being $3,086,536.00, and determined that it would be necessary to levy each year, beginning with the year 1926, for the first five years, three per cent of the total tax levied.

At a meeting of the Board of Supervisors held on April 1, 1926, the drainage tax record, prepared in accordance with the General Drainage Law, was submitted to and examined by the board, and found to be in the form required by law, and it was found that the taxes that were theretofore levied against the lands were apportioned to and levied on each tract of land in the district in proportion to the benefits assessed and not in excess thereof.

The Board of Supervisors, at a meeting held on October 27, 1926, determined, ordered and levied three per cent of the total tax theretofore levied on each piece or parcel of land as an annual installment against the land for 1926.

The tax books for the annual tax levies for 1926, 1927 and 1928 were made and filed in accordance with the General Drainage Law.

The Istokpoga Sub-Drainage District undertook to complete the plan of reclamation.

From time to time, the district incurred indebtedness for its legitimate purposes, under authority of the applicable statutes, issuing its negotiable obligations evidencing such indebtedness, and promising to pay such indebtedenss, both principal and interest.

Thereafter, Chapter 14,736, Laws of Florida, General Acts of 1931, Volume 1, page 359, abolished the Istokpoga Sub-Drainage District and another existing district known as the Indian Prairie Sub-Drainage District, and established the Istokpoga Consolidated Sub-Drainage District to succeed the two districts so abolished.

Chapter 14,736 provided, among other things, that the Istokpoga Consolidated Sub-Drainage District was thereby vested with all the rights, powers and privileges given to drainage districts under the laws of Florida.

It did not purport to cancel out any outstanding indebtedness of the Istokpoga Sub-Drainage District.

It provided for the taking over of the assets of the two former districts, and required the keeping of separate records for the territory formerly embraced in the two old districts, so long as there shall be any outstanding indebtedness of either district.

Section 18 specifically provided that all legal and binding contracts then in force are "hereby recognized and shall remain in full force and effect, and hereby is declared to be

the binding obligation of Istokpoga Consolidated Sub-Drainage District."

Thereafter, the Istokpoga Consolidated Sub-Drainage District incurred indebtedness, for its legitimate purposes, under statutory authorization, issuing its negotiable obligations evidencing such indebtedness and promising payment of such indebtedness, including principal and interest.

The plan of reclamation was never fully completed.

Payment of all outstanding obligations of Istokpoga Sub-Drainage District and of Istokpoga Consolidated Sub-Drainage District not having been made, and such obligations being past-due and in default, the appellant, G. C. Westervelt, being the sole note-holding creditor, filed a bill of complaint in the Circuit Court for Highlands County, Florida, seeking to enforce the liens of the delinquent drainage taxes for the years 1926, 1927 and 1928, such action being instituted by the creditor, under appropriate statutory authorization, Section 25, Chapter 14,736, Laws of Florida, General Acts of 1931, Volume 1, pages 384-386, because of the failure of the district itself to institute proceedings for such enforcement.

The Circuit Court for Highlands County, in its final decree, held that Chapter 17,073, by every intendment, *required* that the Board of Supervisors should "adjust by reduction or otherwise all annual levies" made before May 14, 1935, by Istokpoga Sub-Drainage District, so as to make such levies proportionate to the benefits received to that date from the partially completed plan, and that Chapter 17,072 "would permit such adjustment by cancelling out the old levies and making new levies according to the benefits received up to that time", and that, accordingly, the tax levies for the years 1926, 1927 and 1928 cannot be enforced.

The Circuit Court, in its "Decree Proper", decreed that, "for the reasons hereinbefore set forth in the findings of

the Court", i.e., the enactment of Chapters 17,072 and 17,073, as construed and applied by the Court, the levies or tax liens sought to be enforced are "void and uncollectible."

This was tantamount to a holding and adjudication that the existing assessment of benefits, which had been made in accordance with law, and which had been confirmed by the Circuit Court, and which had been validated by the legislature, and the annual tax levies based upon such assessment of benefits, were voided or "cancelled out", by legislative fiat, notwithstanding the fact that indebtedness had been incurred on the strength of such assessments and tax levies and payable solely from that source.

This construction and application of the 1935 legislation, as made by the Circuit Court, left the appellant-plaintiff without any remedy for the collection of the drainage district obligations held by him, because no new levies were ever made, and no adjustment of existing levies was ever made, and because the Florida Legislature, in 1945, enacted a short-term statute of limitations, Chapter 22,735, General Laws of Florida, Acts of 1945, Volume 1, page 404, Section 2 of which provides that all suits for the enforcement of claims of creditors of Istokpoga Consolidated Sub-Drainage District or Istokpoga Sub-Drainage District shall be brought within one year from the effective date of the statute, May 26, 1945, and that any claims not sued within such one-year period shall be null and void.

The final paragraph of the Florida Circuit Court's decree, which was affirmed by the Florida Supreme Court, is revealingly significant, in the consideration of this appeal, of the lower court's inconsistency, wherein the lower court, having decreed the levies and the obligations of the district void and uncollectible, provided that the liens thereof should not be cancelled and removed until the fees due the defendants' counsel have been paid and satisfied.

Furthermore, the final decree of the Circuit Court, affirmed on appeal to the Florida Supreme Court, holds that "the notes here sued upon are void", such holding being announced in a suit in which the Florida Supreme Court, in a prior decision in this case, had held, "is not primarily a suit upon the notes and warrants now in the hands of the appellant, but that it is one by him, in lieu of the district, to foreclose the liens which the district has failed to foreclose, and that the description of the indebtedness in the bill served principally to show that he is qualified to bring the action", and that "we are convinced that all were not invalid, if any of them were, and if any one of them was valid, appellant was qualified to sue, for, again quoting Section 25 of Chapter 14736, supra, 'the holder of any bond or * * * note' may institute foreclosure." (See opinion Appendix F.)

The appellant takes the position that, to hold the notes void, in a suit brought to foreclose tax liens, is to deny the appellant of due process of law.

The holding that the notes and obligations of the district, held by appellant Westervelt, are void, was predicated, in large part, at least, upon the holding and construction of the Circuit Court, to the effect that, under the applicable statutes, the board of supervisors could not issue them, until it had first levied a uniform acreage tax and had let a single over-all contract for the full completion of the entire plan of reclamation recommended by the chief engineer of the district.

It is significant that Chapter 10,692, Laws of Florida, Special Acts of 1925, authorizing the incurring of indebtedness and the issuance of negotiable promissory notes evidencing such indebtedness does not contain any reference whatever to the levying of a uniform acreage tax as a prerequisite to the incurring of such indebtedness and the issuance of such notes.

It is significant, too, that it does not purport to require the letting of a single contract, at one time, for the construction and completion of the entire project.

It is submitted that Section 1107 Revised General Statutes, Section 1460, Compiled Laws, by any fair construction, contains no such requirement.

It is submitted, further, that the construction placed upon these statutes by the Circuit Court, affirmed on appeal to the Florida Supreme Court, is highly technical, strained, artificial, illogical, unfair and illegal.

These holdings and constructions of the Circuit Court were challenged on appeal to the Florida Supreme Court in Assignments of Error numbered 3, 5, 11 and 12.

The plaintiff-appellant filed a petition for rehearing, in the Circuit Court, upon the grounds, among others, that the statutes, Chapters 17,072 and 17,073, as so construed and applied, are unconstitutional and void, as impairing existing contract obligations and as denying due process, because the State of Florida is prohibited by Section 10, of Article I, of the Constitution of the United States, from enacting a law impairing the obligation of contracts, and is prohibited by Section 1, of the Fourteenth Amendment to the Constitution, from depriving the appellant of property without due process of law.

Rehearing was denied by the Circuit Court.

On appeal to the Florida Supreme Court, these federal constitutional questions were specifically raised by assignments of error numbered 20, 34, 36, 37 and 38.

The Florida Supreme Court affirmed August 1, 1950, but made no specific reference to the federal constitutional questions in its opinion.

Thereupon, a petition for rehearing and a motion for modification of the opinion were filed, both the petition and

the motion specifically calling attention again to these federal constitutional questions.

However, the petition for rehearing was denied December 8, 1950; and, although the original opinion which failed to specifically refer to the federal constitutional questions was withdrawn, a new memorandum opinion was substituted December 8, 1950, which contained the one word "Affirmed."

Justice Thomas dissented.

Questions Presented

The questions presented are shown by the assignment of errors, and (a) are not Chapters 17,072 and 17,073, Laws of Florida, General Acts of 1935, as construed and applied by the Circuit Court for Highlands County, Florida, which construction and application were affirmed on appeal to the Florida Supreme Court, unconstitutional and void, because the legislatures of the several states are prohibited by Section 10, of Article I, of the Constitution of the United States, from enacting a law impairing the contract obligations of those of the notes and evidences of indebtedness which were issued prior to the effective dates of Chapters 17,072 and 17,073, and (b) are not Chapters 17,072 and 17,073, Laws of Florida, General Acts of 1935, as construed and applied by the Circuit Court for Highlands County, Florida, which construction and application were affirmed on appeal to the Florida Supreme Court, unconstitutional and void, because to so cancel out such tax levies would deprive the appellant of his property rights as the holder of the notes and evidences of indebtedness which were issued prior to the effective dates of Chapters 17,072 and 17,073, without due process of law, in violation of Section 1, of the Fourteenth Amendment, to the Constitution of the United States.

The Questions Presented Are Substantial

Drainage Districts organized under the general drainage laws of Florida, originally enacted in the year 1913, are among the most useful instrumentalities employed in the development of the state. They have been the medium through which millions of acres of swamp and overflowed lands have been reclaimed and converted into productive farms, groves and pasture lands.

All of these drainage projects have had to be financed with borrowed funds.

The appellant is a creditor of Istokpoga Sub-Drainage District, and its successor, Istokpoga Consolidated Sub-Drainage District, to the extent of approximately $200,000.00, all of which indebtedness is evidenced by negotiable promissory notes and evidences of indebtedness of the respective districts.

Many millions of dollars of such drainage district indebtedness, evidenced by negotiable instruments of the various districts, are outstanding.

The Reconstruction Finance Corporation alone has invested more than $10,000,000.00 in obligations of Florida drainage districts.

It is difficult to comprehend how the state courts could have construed and applied this legislation as it was construed and applied in the final decree of the Circuit Court for Highlands County, Florida, affirmed on appeal by the Florida Supreme Court, in the face of the fact that the Florida Supreme Court had previously held that the reclamation tax, based on the assessment of benefits, is the only source of payment of most obligations of such drainage districts. *State ex rel. Vans Agnew* v. *Johnson,* 112 Fla. 7, 150 So. 111, *Campbell* v. *State ex rel. Garrett,* 124 Fla. 244, 168 So. 33.

Such legislation, so construed and applied, will not stand

up, under the provisions of the Constitution of the United States.

Section 10, Article I, of the Constitution of the United States, provides that no state shall pass any law impairing the obligation of contracts.

Article VI provides that the Constitution is the "Supreme Law of the Land" and the Judges in every State are bound thereby, "anything in the Constitution or Laws of any State to the contrary notwithstanding."

The contract of a creditor of a municipality or other public corporation debtor includes the laws in force at the time when the contract was made. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197, *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 55 Sup. Ct. 555, 556.

Where evidences of indebtedness have been issued by a public corporation debtor with a provision for the levy and collection of stipulated taxes for their payment, the tax is the security.

"The annual tax * * * could not be afterwards severed from the contract without violating its stipulation, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction." *Louisiana* v. *Pillsbury*, 105 U. S. 278, 26 L. ed. 1090.

Where a municipality or other public corporation debtor incurs obligations, then, as long as she exists, laws are void which withdraw or restrict her taxing power so as to impair the obligation of her contracts made upon a pledge expressly or impliedly given that it shall be exercised for their fulfillment. *Wolff* v. *New Orleans*, 103 U. S. (13 Otto) 358,

The obligations involved in this case had already been incurred, at least the most of them had, before the 1935 Legislative Acts were enacted.

These contract obligations were made upon a pledge expressly or impliedly given of the taxing power as it existed at the time when the obligations were incurred.

When a municipality incurs an indebtedness under authority to levy and collect taxes for its payment, the legislature is without constitutional power to repeal or withdraw a portion of the taxing power until the contract is satisfied. *Von Hoffman* v. *Quincy*, 71 U. S. (4 Wall.) 538, 18 L. ed. 403.

It was held over seventy years ago that a provision of the Constitution of the State of North Carolina, and statutes enacted in pursuance thereof, which exempted from sale under execution or other final process for the collection of debts, the homestead of the debtor to the value of $1,000, were void as to debts contracted before the adoption of such constitution, as repugnant to Article I, Section 10, of the Constitution of the United States. *Edwards* v. *Kearzey*, 96 U. S. (6 Otto) 595.

The same was held true of an Arkansas statute exempting the proceeds of life insurance policies from liability or seizure under judicial process, as applied to a debt owing before such enactment, notwithstanding there was a legislative declaration of an emergency. *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 54 Sup. Ct. 816.

A state cannot so change the existing tax laws of the state as to "postpone", "retard", "hinder", or "embarrass" tax collections pledged for debt payments, even though complete frustration is neither attempted nor accomplished by the measures adopted. *Louisiana* v. *New Orleans*, 102 U. S. 203, 26 L. ed. 132.

The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforce-

ment of the contract, the obligation of the contract is to that extent weakened. *Louisiana* v. *New Orleans,* 102 U. S. 203, 206, 26 L. ed. 132.

It is submitted that, after the assessment of benefits was made and confirmed, and after they were validated by the legislature, and after the annual installments of taxes for the years 1926, 1927 and 1928, based upon the assessment of benefits, were levied, and after contract obligations had been incurred, payable from such reclamation taxes, the 1935 legislature could not require the adjustment "by reduction", of all these existing annual levies, so as to make such levies proportionate to the benefits received to that date from the partially completed plan, by "cancelling out the old levies and making new levies according to the benefits received up to that time", and could not, by merely "passing a law", render the existing tax liens in which the appellant had a vested right, "void and uncollectible", because the cited provisions of the federal constitution prohibited it from doing so.

The creditor "acquired a vested right in the assessment and levies as made." *State ex rel. Neafie* v. *Board of Commissioners of Everglades Drainage District,* 139 Fla. 559, 190 So. 712, 716.

The State of Florida is prohibited from depriving the creditor of a vested right "without due process of law." Section 1, of the Fourteenth Amendment, to the Constitution of the United States.

The federal guaranty of due process extends to state action, whether it acts through its judicial, its legislative, or its administrative branch. *Shelley* v. *Kraemer,* 334 U. S. 1, 68 Sup. Ct. 836.

The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legis-

lation and its judicial interpretation. *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 69 Sup. Ct. 1291.

It is true that the opinion of the Florida Supreme Court does not, in express language, state that the legislation here assailed is upheld against the attack made upon it.

However, it does affirm the action of the Circuit Court for Highlands County in denying the petition for rehearing which was interposed immediately following the entry of the final decree in which the legislation here assailed was first given the construction and application which rendered it subject to challenge on constitutional grounds.

Federal constitutional questions were specifically raised by assignments of error numbered 20, 34, 36, 37 and 38.

It may be urged that there are non-federal grounds sufficient to sustain the decree appealed from in view of the findings of fact contained in the decree of the Circuit Court. While we realize that the Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact, we submit that the findings of fact in the decree of the Florida Circuit Court are without evidence in the record to support them, and even if true, such findings are inadequate to support the judgment of the lower court without consideration of the federal questions herein set forth, and to base the decree appealed from upon findings of fact, unsupported by the record, would be to deny the appellant due process of law.

The Supreme Court of the United States is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given to a state statute which has been brought in question. *Columbia R. Gas & E. Co.* v. *South Carolina,* 261 U. S. 236, 43 Sup. Ct. 306, *Long Sault Development Co.*

v. *Call*, 242 U. S. 272, 37 Sup. Ct. 79, *Fisher* v. *New Orleans*, 218 U. S. 438, 31 Sup. Ct. 57, *Louisiana R. & Nav. Co.* v. *Behrman*, 235 U. S. 164, 35 Sup. Ct. 62, *Detroit United R. Co.* v. *Michigan*, 242 U. S.238, 37 Sup. Ct. 87, *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 32 Sup. Ct. 577.

Where a substantial federal claim has been duly raised and necessarily denied by the highest state court, the Supreme Court of the United States has jurisdiction and will decide the case on its merits. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, — U. S. —, 71 Sup. Ct. 215.

In fact, one of its most recent decisions was handed down in a case involving a criminal conviction under a state statute, where the state court of appeals merely declined to review the case under its normal appellate power, and further declined to review it on certiorari, stating that the issues were not "matters of public interest" which made review desirable. *Niemotko* v. *Maryland*, — U. S. —, 71 Sup. Ct. 325 (327).

It is submitted that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

D. C. Hull,
Lewis E. Purvis,
Counsel for Appellant.

APPENDIX A

IN THE SUPREME COURT OF FLORIDA, JUNE TERM A. D. 1950

Friday, December 8, A. D. 1950

G. C. WESTERVELT, Appellant,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT, a Florida Drainage Corporation, et al., Appellees

Highlands County

Counsel for Appellant having filed in this cause Petition for Rehearing and Motion for Modification of the Opinion of this Court filed August 1, 1950, and having been duly considered it is ordered by the Court that the Opinion filed August 1, 1950 be and the same is withdrawn and the Opinion this day filed substituted therefor and the rehearing denied.

A true copy,
Teste:

Guyte P. McCord, Clerk Supreme Court.

(The Mandate in this Cause Has Today Been Issued and Mailed to the Clerk of the Circuit Court for Highlands County.)

APPENDIX B

IN THE SUPREME COURT OF FLORIDA, JUNE TERM A. D. 1950

EN BANC

G. C. WESTERVELT, Appellant,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT, a Florida Drainage Corporation, et al., Appellees

Opinion filed December 8, 1950

An Appeal from the Circuit Court for Highlands County, Don Register, Judge

Lewis E. Purvis, John T. Wigginton, D. C. Hull, Hull, Landis, Graham & French, for Appellant.

Mabry, Reaves, Carlton, Anderson, Fields & Ward for Appellees.

Per CURIAM:

Affirmed.

Adams, C. J., Terrell, Chapman, Hobson and Roberts, JJ., concur.

Thomas, J., dissents.

Sebring, J., not participating.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA, JUNE TERM A. D. 1950

EN BANC

G. C. WESTERVELT, Appellant,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT ET AL., Appellees

Opinion filed August 1, 1950

An Appeal from the Circuit Court for Highlands County, Don Register, Judge

Lewis E. Purvis, John T. Wigginton, D. C. Hull, Hull, Landis, Graham & French, for Appellant.

Mabry, Reaves, Carlton, Anderson, Fields & Ward, for Appellees.

Per CURIAM:

This appeal is from a final decree in a cause that has been before this Court on several occasions at which times various interlocutory orders were tested and the course that the litigation was to sail was charted. The last of these guideposts was *Westervelt* v. *Istokpoga Consolidated Sub-Drainage District, et al.*, 160 Fla. 535, 35 So. (2) 641, wherein the Chancellor was importuned upon hearing all the evidence as to the "equities" involved, when entering his decree, to "make a finding of fact on the material matters affecting the equities of the parties." The Chancellor has meticulously and in a praiseworthy manner cooperated with this request in setting forth at length and in detail his reasons for denying the appellant, plaintiff below, the relief he sought.

The suit was brought by the appellant under authority of Section 25 of Chapter 14736, Laws of Florida, Acts of

1931, to foreclose liens of the appellee sub-drainage district on certain lands, he being the owner of nearly $200,000 worth of its obligations and the district having failed to bring suit to collect delinquent taxes.

The appellees by answer and counter-claim set forth various charges which, in toto, declared that Westervelt should be barred by his inequitable deportment from enforcing the liens which he claimed.

The evidence of this inequitable behavior over a period of many years filled hundreds of pages in the record. We have not found that this testimony was incompetent. We find nothing that does or should cause us to take the view that the Chancellor should not have believed it. Suffice it to say that he did. His findings of fact were replete with his conviction that the conduct of Westervelt was so reprehensible and unconscionable that he should not be permitted to recover. With these findings we do not disagree.

Affirmed.

Adams, C. J., Terrell, Chapman, Hobson and Roberts, JJ., concur.

Thomas, J., dissents.

Sebring, J., not participating.

APPENDIX D

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR HIGHLANDS COUNTY

In Chancery

Case No. 5561

G. C. WESTERVELT, Plaintiff,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT ET AL., Defendants

Final Decree

Introductory

The Court heard the evidence in this case beginning November 23, 1948, and continuing from time to time for

many hearings. After the testimony was concluded, the Court heard argument of counsel for several days.

Following the suggestion of the Supreme Court

> "that it would be a great saving of expense and time if the chancellor when entering the decree should make a finding of fact on the material matters affecting the equities of the parties" *(35 So. 2d 641)*

the Court will deviate from his preference for short decrees and herein state his findings of fact and conclusions of law upon the main questions involved.

Istokpoga Sub-Drainage District was organized under the General Law, Sec. 1451 et seq., of Compiled General Laws of Florida. The organization and general history of the said District is stated helpfully in the de bene esse testimony of Mr. Hylton, one of the witnesses for defendants in the above case.

Benefits were assessed against different parcels of land within the District according to a proposed complete system of drainage but the administration of the affairs of the District from the very beginning took on the aspect of a promotion scheme as much as a bona fide attempt to complete an efficient drainage system. A few landowners owning large areas of lands controlled the administration of the affairs of the District from the very first until after many years of unsuccessful management a consolidated district, composed of the old Istokpoga Sub-Drainage District, a part or all of the Indian Prairie District, and some new territory, was organized under the name of Istokpoga Consolidated Sub-Drainage District in 1931. The Consolidated District made no constructive accomplishment and after ten years of failure, it went through several years of receiverships terminating in the present situation in which eighty per cent of the lands of the old Istokpoga District have been according to the records freed from drainage taxes and liens by compromise settlements made by landowners with the holders of indebtedness claims against the District, and presumably eighty per cent of this indebtedness has been cleared off by such compromise settlements. The compro-

mise settlements were worked out in accordance with a decree in Federal Court for the Southern District of Florida, the proceeding under which the settlement was made having been very generally referred to in this case as the Federal Receivership case. Some compromise settlements were made before and some since the Federal Receivership.

This indebtedness being the original indebtedness claimed against the old Istokpoga Sub-District and further indebtedness created by the Consolidated District was not created in the regular manner provided by the General Law but from the testimony of Mr. Hylton we gather that funds for starting the drainage work were furnished by large landowners whose lands would be specially benefited by the canal work for which the funds were used. The only parts of the original plan that were attempted were a canal known as the main canal in the northeastern portion of the old Istokpoga District, which was never finished, and another canal—never finished—known as the slough canal in the southeastern portion of the old Istokpoga District, begun upon the insistence of landowners around Brighton, a development promoted partly by means of the canal construction in that area and really financed, according to Mr. Hylton, by the interested landowners.

At the time of the organization of the Istokpoga Sub-District, Istokpoga Farms owned approximately 33,000 acres, Howard Cole & Co. owned 60,000 acres, and the remaining 9,000 acres of the total 102,000 acres in the District were owned by E. D. Treadwell, Fred McConnell, F. E. Platt, and a few other small ownerships. Shortly after the District's formation, Howard Cole & Co. sold about 33,000 acres to Curtiss-Bright Co. (see deposition of W. H. Hylton).

The first Board of Supervisors of old Istokpoga District consisted of E. J. Etheredge and W. H. Hylton, the principal officers and owners of Istokpoga Farms Company, and James H. Bright, President of the Curtiss-Bright Co. These three continued as the Board of Supervisors until after the Consolidated District was formed in 1931. Bright retired June 29, 1931. Hylton and Etheredge continued as Supervisors of the Consolidated District until Hylton re-

tired June 29, 1937, and Etheredge retired June 21, 1939. Each of said Supervisors was succeeded by another large landowner, elected, of course, by a majority of the owners in acreage. Two companies at all times during the life of the old Istokpoga Sub-District owned the acreage majority.

The Palm & Pine Land Co. was organized by the plaintiff Westervelt. It acquired the lands of the Istokpoga Farms. The plaintiff has controlled said company from the date of its organization. He was formerly associated with the Curtiss-Bright Co., became acquainted with the District in 1927, and undertook, at the request of the Curtiss-Bright Co. and with the cooperation of the Board of Supervisors, to refinance the District.

He, the plaintiff, conceived the idea and caused to be created the Consolidated District. He was Chief Engineer of this District from 1931 to 1948 and was a member of the Board of Supervisors from June 25, 1935, until the end of his three-year term in June, 1938. He proposed that he and Palm & Pine Land Co. would lend money to the Istokpoga Sub-District from time to time to meet its needs for *administrative expenses,* and all notes listed in the Bill of Complaint as having been issued by said Istokpoga District to Westervelt or Palm & Pine Land Co. were issued for moneys lent for said purposes. The earliest note is dated January 1, 1929, and the latest is dated June 30, 1931. In the minutes of a meeting of the Board of Supervisors of Istokpoga Sub-District (Plaintiff's Exhibit "A-2" in evidence) is shown a complete list of all items of indebtedness of said old Istokpoga District as of June 29, 1931, said list being as follows:

"Curtiss-Bright Company	Cash Loans	$111,726.05
Palm & Pine Land Co.	Notes Purchased	47,604.32
Palm & Pine Land Co.	Cash Loans	9,839.27
E. D. Treadwell	Legal Services	6,000.00
Fred C. Morgan	Balance on Contract	82,210.75
W. H. Hylton	Balance Salary & Expense	7,164.45
G. C. Westervelt	Cash Loans	1,455.45
Charles & Rutherford	Bond Attorneys	2,000.00
H. & W. B. Drew	Office Equip. & Printing	2,181.62
T. Ed Bryan	Expenses Bond Sales	6,273.67"

It appears that this total indebtedness of $276,455.58 includes all moneys paid to or owing to Fred C. Morgan for

all drainage work done by Morgan on the incompleted contract and all other indebtedness represented by notes or warrants.

Further indebtedness was incurred later by Consolidated District and all notes issued by that District to the plaintiff or Palm & Pine Land Co. were for operating, promotion, or administrative expenses.

A contract for construction of *part only* of the Plan of Reclamation was let by the Istokpoga District to one Fred C. Morgan in October, 1925, and all notes shown by the Bill of Complaint to have been issued by said Sub-District to James H. Bright and Curtiss-Bright Co., included in the foregoing tabulation as indebtedness to Curtiss-Bright Co., were for moneys furnished to pay Morgan the periodic installments on his contract.

The indebtedness to Fred C Morgan represents an unpaid balance for construction which the District was unable to pay in cash after Morgan had stopped work in April, 1927, because the District was unable to finance the completion of the contract. The indebtedness to T. E. Bryan was for alleged expenses in undertaking to persuade the property owners to subsidize, in lands or money, a sale of bonds so that the District could sell ostensibly at .95—the minimum allowed by the statute—but actually at such smaller figure as a buyer could be induced to pay in view of the subsidy. All notes representing the unsettled part of the Istokpoga and Consolidated indebtedness are now owned by plaintiff and sued upon herein as shown by the testimony and endorsements. But the plaintiff upon questioning has by his evasive attitude refused to state what he has paid for notes purchased by him.

An undetermined but considerable amount of the moneys advanced by the plaintiff and by his corporation, Palm & Pine Land Co., to the Istokpoga Sub-District for administrative expenses was intended and in fact used in promoting the Consolidated District and procuring the passage of the Act of 1931 (the consolidating Act.)

The written contract with Morgan for construction is lost and no copy could be produced. The evidence shows, however, that it called for the construction of 3,143,196 cubic

yards out of a total required by the Plan of Reclamation of 4,250,000. Only 1,342,000 cubic yards were excavated under the contract, at a total cost of $208,010.00.

The notes and warrants of the Consolidated District were all issued for administration expenses including legal and engineering services.

The assessed benefits from the proposed Istokpoga Sub-Drainage District as shown by the Report of Commissioners filed in evidence amounted to a total of $28,059,421.35, which, of course, contemplated the total benefits to be received from a completed drainage system. However, only a small percentage of the construction was ever carried out, no canal was completed, and the defendants in this case say that their lands received no benefits from the construction that was done.

Although Sec. 1460 of Compiled General Laws of Florida provided that before the Board could be empowered to provide funds "to pay the total costs of works and improvements" they should first levy a uniform tax of not exceeding fifty cents per acre on land in the District for providing expenses of organizing the District, making surveys, assessing benefits and damages, and other expenses as necessarily incurred, the Board of Supervisors never did make said uniform levy; and although the levy for the year 1926 only was shown by the minutes to have been authorized and made, tax books purporting to show annual levies were made up, signed as shown in the testimony in the case, and treated by the officers of the District as tax levies of the District for the years 1927 and 1928.

No levies of any kind were made or pretended to be made after 1928 and only $41,998.21 of the total tax of $3,086,-536.00 levied for 1926-27-28 was ever collected in cash. All other drainage taxes shown by the records as paid were paid by trades or compromises in which indebtedness against the District was canceled in return for drainage tax receipts.

The total amount collected upon the 1926-27-28 levies in cash and by compromises in principal and penalties as shown by the books was $491,383.04 and the present suit is brought by the plaintiff, G. C. Westervelt, who avers that he is the sole owner of the indebtedness obligations against

the Consolidated District and prays that the Court declare a lien against the lands in the old Istokpoga District (now a part of Consolidated District) as described in his Complaint, which include all lands in old Istokpoga District upon which said tax levies appear not to have been paid by compromise or otherwise, for the unpaid assessments of 1926-27-28, and that said lands be sold to pay all such unpaid assessments with penalties of 2% per month and attorneys' fees. The Complaint further prays for a deficiency decree.

Plaintiff claims the right to bring this foreclosure suit under the statute (Chap. 14736 General Acts 1931) because the District has not done so.

The landowners, by their Amended Answer, deny the validity of the alleged assessments upon various grounds; deny the validity of the notes and warrants described in the Bill of Complaint upon various grounds; and say that the plaintiff cannot recover for the additional reason that his hands and the hands of his privies (prior owners of certain of the notes and warrants) are unclean.

The following legislative Acts and Constitutional amendment are especially pertinent:

Sec. 1460 C. G. L. (298.29 F. S.) which required the Board of Supervisors of Istokpoga Sub-District to levy a uniform acreage tax for the purpose of paying preliminary expenses before said Board should

> "be empowered by subsequent provisions of this article to provide funds to pay the total cost of works and improvements of the district."

Chapter 10692 Spec. Acts of 1925 became effective June 3, 1925. This act authorized the Board of Supervisors of Istokpoga Sub-District, upon stated conditions, to borrow money for the early completion of the work or to enter into a contract for the said work (referring to the Plan of Reclamation) prior to the approval by the Court of the assessments to be made against said lands by the Commissioners to be appointed by the Court.

Chapter 14736 Gen. Laws of 1931 became effective May 21, 1931. This Act abolished the Istokpoga Sub-District

and created the Consolidated District. It is rather long and follows closely the General Drainage Law.

In 1935, by *Chapter 17073 Gen. Laws*, Sections 20, 28, 41, 42, and 46 of the Act of 1931 were amended. This amendment changed the effect of the Consolidating Act in the following important particulars:

By the Act of 1931 the Consolidated District assumed the obligations of the Istokpoga Sub-District and became entitled to the assets of said Sub-District. Assessment of benefits theretofore made by the Istokpoga Sub-District and the Indian Prairie Sub-District and those required by the Act to be made upon the newly included lands, were declared to be the assessed benefits against the lands in the Consolidated District.

The amendment of 1935 switched the obligations of the Istokpoga Sub-District (and Indian Prairie Sub-District) back to the lands therein and required that the Board of Supervisors should each year, beginning with 1931, levy the amount of annual installment of total tax levied

> "necessary to pay the interest and create a sinking fund to pay the principal on *all* outstanding bonds or other indebtedness"

of such Sub-District

> "provided that said Board of Supervisors in determining and making said levy shall take into consideration the progress that has been made in completing the plan of reclamation and *shall lay a larger per cent of said annual levy against those lands which up to the date of said levy have received the greater portion of the benefits derived from partial completion of the plan of reclamation than that laid against those lands which had received a smaller portion of the benefits.*"
>
> "Provided further that in making said annual levies for the purpose of taking care of bonds or other obligations still outstanding issued in Istokpoga Sub-Drainage District prior to the adoption of Chapter 14736, the Board of Supervisors shall confine such levy

to property situated within the old Istokpoga Sub-Drainage District and such levies shall be based upon the assessment of benefits made in the old Istokpoga Sub-Drainage District." *(Amended Sec. 20)*

Article 9, Section 6, of the Constitution, as amended November 4, 1930, forbids the issuance of bonds except when authorized by vote.

FINDINGS OF THE CIRCUIT JUDGE

1. The defendants in this suit claim that there is no equity in the plaintiff's case and the Court finds ample grounds for sustaining this defense.

The original Plan of Istokpoga Sub-District provided for construction work requiring excavation of 4,250,000 cubic feet of earth, while the work actually completed consisted of only 1,342,000 cubic feet of excavation. No contract was ever let for construction upon the Plan of Reclamation upon which benefits were assessed.

The benefits, if any, to defendants' land from the partial completion of the Plan of Reclamation are uncertain, doubtful, and impossible of ascertainment. The partial construction of the canal from the Kissimmee River to Lake Istokpoga did not reach the lake. It bordered and ran into lands then owned by Istokpoga Farms, and later on by Palm & Pine Land Co., and hence benefited said lands, but the construction under the contract stopped considerably short of Lake Istokpoga. Likewise, the slough canal on which construction began at the Kissimmee River and extended toward the town of Brighton in lands owned by the Curtiss-Bright Co. outside the District might have been of some benefit to that company but its construction stopped far short of any lands of the defendants and did not affect the waters originating on or draining onto defendants' lands. The *projected* canal south of Lake Istokpoga, with its gridiron of laterals reaching and directly affecting the defendants' lands, was not begun.

The law contemplates that lands shall contribute to the cost of the Plan of Reclamation in proportion to the benefit

each piece or parcel of land receives. The Commissioners are required by law to assess benefits

> "that will accrue to each government 40-acre tract or other subdivision of land * * * " from carrying out and putting into effect the plan of reclamation theretofore adopted." (*Sec. 1463 C.G.L.*)

The wording of Sections 1461, 1462, 1463, 1467, and 1468 further emphasize that the cost must be apportioned according to the benefits to be derived from the *completed plan.* Hence, when the plan was not and could not be completed, there was no basis for the levy or collection of annual assessments. Accordingly, Chapter 17073, General Acts of the Legislature of 1935, applying to Istokpoga Sub-Drainage District, provided that the Board of Supervisors should each year beginning with 1931 make an annual levy and should in making such levy lay a larger per cent against lands that had up to the date of the levy received a greater portion of benefits from the partially completed Plan of Reclamation than the levy laid against lands that had received a smaller portion of such benefits. Said Chapter 17073 by every intendment required that the Board should

> "adjust by reduction or otherwise all annual levies"

made before May 14, 1935, by Istokpoga Sub-Drainage District so as to make such levies proportionate to the benefits received to that date from the partially completed plan instead of according to the old, incompleted plan; and Chapter 17072, General Acts of 1935, would permit such adjustment by canceling out the old levies and making new levies according to the benefits received up to that time.

Equity demanded that this adjusted assessment of benefits be made but the Supervisors in control (Captain Westervelt was one) elected not to do this. Later certain property-owning noteholders proceeded to make settlement in Federal Court. Then after the claims against the owners of some eighty per cent of the lands were settled upon an arbitrary compromise basis, Captain Westervelt filed suit against the defendants here for the full, undischarged total

assessments with 336% interest up to April 1, 1942, and interest from 1942 up to the present time at 2% per month, making a total amount claimed for principal on said assessments and interest to July 1, 1949, of 610% of the total amounts of said original unpaid assessments. This discrimination by the plaintiff against these defendants amounting to the difference between approximately 200% of the total assessments which would be payable at this time under the Federal Court plan and 610% of the total assessments which he seeks to recover from these defendants at this time can be explained only as a penalty charge of an additional 410% of the original tax total against these defendants because they failed to come in and make settlement in Federal Court.

Whether or not the Federal Court proceeding was properly brought, the failure to readjust tax levies according to benefits received from the uncompleted construction and the discrimination mentioned and the penalty sought to be collected in this suit are so utterly unconscionable as to bar any recovery in a Court of equity for the amount sought.

2. Reference has been made and will be made from time to time in this Decree to a plan of settlement under which numerous landowners on the one hand made settlements with one or more large creditors of the Istokpoga Consolidated District on the other hand under the terms of a decree entered in the Federal Court at Tampa on July 3, 1944, in the case of Edward Major Campbell *v.* Istokpoga Consolidated Sub-District. The plan as described in the said decree in Federal Court is somewhat tedious and in order to better understand and to be able to refer to the plan in connection with the Westervelt case now under consideration in this court, the undersigned Judge of this Court for the purpose of making a comparison with regard to this foreclosure proceeding has taken at random the certain parcel of land included in this foreclosure proceeding described in the Amendment to Bill of Complaint filed herein on November 23, 1945, as follows, to-wit:

> "NE¼ of Sec. 28, Twp. 37 S., R. 31 E., being the property of Laura C. Dickenson."

To make settlement with the District and clear said land under the said order in Federal Court dated and filed July 3, 1944, in said case, the following settlement would be required as of Aug. 1, 1949 (if the settlement offer had remained open until now), to-wit:

1.146% of $7,200.00, the total assessed benefits to said Laura C. Dickenson		$ 823.00
160 acres @ 73.14¢ per acre		117.00
Accumulated tax (26-27-28, without penalties)		594.00
		$1,534.00
Credit Curtiss overage gift:		
160 acres @ 52.8¢	$ 84.48	
160 acres @ 15¢	24.00	
	$108.48	108.48
		$1,425.52
51½% of $1,425.52		$ 734.14
2% of $1,534.00, Receivership Costs		30.68
		$ 764.82
Interest @ 6% from Feb. 1, 1943, to Aug. 1, 1949—6½ years		298.28
Total for settlement Aug. 1, 1949, under Williams' Receivership		$1,063.10
Amount claimed in this foreclosure suit against this property ($594.00) with penalties @ 2% per month to Nov. 23, 1945, when suit started		$3,109.59
Additional penalty to Aug. 1, 1949, on $594.00		525.70
Total claimed on above tract (without costs and attorneys' fees)		$3,635.29

Thus we see that by the complicated plan adopted for settlement in the Federal Court proceeding as indicated in said order dated July 3, 1944, and explained above the amount in cash required for settlement on this land was in 1944 approximately 140% of the total principal of the 1926-27-28 assessments against the land to be released, and this would not be considered as an overly generous settlement on the part of the creditor, Captain Westervelt. But now in this suit against the defendants here the same creditor, plaintiff Westervelt, demands 610% of the total principal of the 1926-27-28 assessments against the lands of these defendants.

And so from every angle the disposition to make any reasonable, fair, or equitable settlement is absent. This attitude or disposition of the plaintiff is out of place in a Court of equity.

3. The Boards of Supervisors, from the inception of the Sub-District and continuing even since this suit has been pending, have handled the affairs of the Sub-District and the Consolidated District in their own way and to their own liking, regardless of statutory requirements. They deliberately failed to levy the uniform acreage tax in the Sub-District or the Consolidated District; they did not follow the provisions of the Act of 1925 with reference to letting the contract for the construction of the whole Plan of Reclamation or the issuance of notes to obtain money to pay the contractor. They deliberately ignored the Act of 1935 which required them to make annual levies, beginning as of 1931, taking into consideration the fact that the Plan of Reclamation had been only partially constructed instead of completely constructed as was contemplated in the assessment of benefits by the Commissioners. They allowed notes and warrants to be issued without regard to legal restrictions or requirements. They compounded interest in some cases where notes were renewed. They issued many notes of the Sub-District after November 4, 1930, and all notes and warrants of the Consolidated District without calling or holding an election to authorize the same. They charged the cost of promoting the Consolidated District and of procuring the passage of the Consolidating Act to the Sub-District; they paid themselves or their companies as note holders interest at unlawful rates and used notes to settle on the books of the District taxes levied against their lands, and in some instances put up bonds which they could not sell as collateral for the notes which they took at the rate of two for one.

The witness Hylton, in reply to the question why the supervisors did not levy the uniform tax, said: "It was not done, no sir. The people interested in the Drainage District, promoting it, owned most of the land and put up the money on the District."

Apparently, it was the oneness of land ownership and District financing and officering that made the Supervisors feel at liberty to ignore the law in so many respects and carry on the affairs of the District in their own way. The plaintiff Westervelt had knowledge of all said matters and

things in 1927 and thereafter, and his privies in title had such knowledge from the beginning, which is chargeable to the plaintiff.

4. The cost of uncompleted or partial construction by Morgan, the contractor, upon the Plan of Reclamation, being practically the only work done, was		$208,000.00
The District collected upon the alleged levies of 1926–27–28 in cash	$ 41,998.21	
Baldwin as Receiver collected in cash and credits	169,172.66	
Williams as Receiver collected in cash and credits	280,212.17	
	$491,383.04	
Plaintiff has collected pending this suit at least	3,373.18	
and seeks by this suit to collect the further sum of approximately	200,000.00	
Contemplated total debts discharged by the District	$694,756.22	

These figures, indicating a small amount for construction and much for interest, penalties, administration, etc., give substantial assistance to the Court in understanding the causes leading to the present condition of the District. The figures do not include some $60,000.00 expended by the Consolidated District in efforts to further promote and finance the District.

5. As to the receivership in the Federal Court, this Court is satisfied that the plaintiff Campbell did not own the notes on which he brought suit and, therefore, Federal jurisdiction was not properly obtained. It further appears that said suit was instituted for the primary purpose of enabling the Curtiss Properties, a Florida corporation, to fortify title to lands which it was endeavoring to sell by an order of the Federal Court enabling it to pay the levies against said lands in notes, and decreeing that payment in such form would clear the lands. That purpose was accomplished and the lands in question were sold and conveyed to Lykes Bros. Thereupon, Baldwin, the first receiver appointed by the Federal Court, was discharged, and Mr. Williams was, at the instance of the Palm & Pine Land Co. through the plaintiff Westervelt as president, appointed receiver in the same action under a plan whereby the Palm & Pine Land Co., claiming to be the owner of all obligations of the District, offered to sell notes and interest in notes

to the landowners at an arbitrary figure to enable such owners to cancel of record liens against their lands by the use of notes. Shortly after the Bill of Complaint was filed by Campbell, the Curtiss Properties and Mrs. Wheeler, through the same attorneys who filed the Bill for Mr. Campbell, and with the endorsed consent of Campbell by his said attorneys, intervened in said suit and proposed the plan of compromise settlement and payment of taxes with notes, which the Court approved. The Palm & Pine Land Co., by the plaintiff, its president, joined in said petition and answered as an intervener. Palm & Pine Land Co. intervened at the request of Curtiss Properties, and the pleadings for Palm & Pine Land Co. were prepared by the attorneys for the Curtiss Properties. Jurisdiction of the Federal Court was invoked on the sole ground of diversity of citizenship, and if jurisdiction of the subject matter existed at all, it was lost when Curtiss Properties and Palm & Pine Land Co., citizens of Florida, intervened with the consent of the plaintiff (*Johnson* vs. *Riverland Levee District,* 8th Cir. 117 Fed. 2d 711). Palm & Pine Land Co. cleared their lands of taxes in the same fashion as the Curtiss Properties and later sold to Lykes Brothers. The defendants had only an incidental place in this suit and they were given an opportunity to settle their taxes with notes which the two large landowners would provide at an arbitrary figure. They declined to accept this settlement on the ground that their lands had received no benefit and that the notes, warrants and tax levies were invalid. It is clear that no representation of the defendants induced the plaintiff to acquire the alleged obligations on which he sues.

The Federal suit does show the continued control of the District and its affairs by the large landowners. The two mentioned, Curtiss Properties and Palm & Pine Land Co., owned at the time of the suit a majority of the land, they were the chief beneficiaries of the work done in the District and owned practically all, if not all, of the outstanding notes and warrants, most of which were issued either directly or indirectly at their instance.

6. Nothing is shown to indicate any proper claim of plaintiff against the lands of the defendants here or against

the District; but even if the claim had the least merit, there is nothing definite upon which this Court could intelligently decree a recovery in any amount by any one. The utter unfairness of enforcing assessments against property upon a basis of a completed drainage system according to an adopted plan after only a small portion of the plan had been executed and all further construction finally abandoned was recognized by the legislature in Chapters 17072 and 17073, General Acts of 1935, and the legislature provided for adjustments of all levies previously made as therein stated.

The duty devolved upon the Supervisors in 1935 to adjust such previously made levies as just stated but they did not make the adjusted assessments and attempt to collect on them but appeared to have abandoned the original assessments.

This suit is brought to enforce payment of alleged assessments which this Court considers invalid for the reasons hereinbefore stated and after this lapse of time and after the plaintiff and his privies in ownership of the alleged securities involved have by their own management or lack of management brought the Istokpoga Consolidated District and the two former Districts merged into the Consolidated to the present resulting condition, this Court is without jurisdiction to formulate or work out any plan for any relief in response to the plaintiff's Bill of Complaint.

7. Counsel for plaintiff have requested the Court that upon the Court's denial of plaintiff's prayer for a foreclosure sale of the property of defendants and the entry of a deficiency decree that the Court at least enter a judgment against the Drainage District for the unpaid amount of the notes, interest, and attorneys' fees. In this connection it must be considered that a drainage district is a creature of statute law and is dependent upon the statute law for its powers, functions, and liabilities. Its liabilities are limited by its power to levy taxes in accordance with law and its only taxing power is limited here to taxes assessed against lands proportionate to the benefits which the District in accordance with law has provided for the lands taxed.

Sec. 25, Chapter 14736, General Acts of 1931, provides among other things that

> "Any judgment or decree that may be rendered in any such suit (by a bondholder or a noteholder) shall be enforceable only against said lands"

and therefore, no decree for plaintiff would be possible where the Court finds that there is no lien against the lands for the alleged obligations sued upon, as in this case. This suit is by statute strictly an in rem proceeding.

In the present case the legislative acts of 1935 provided a method for adjusting assessments against all lands in old Istokpoga District according to benefits actually received up to 1935. The Supervisors and not holders, of which the plaintiff was one, at that time had an opportunity to insist upon an adjusted assessment of benefits and annual levies based thereon but they passed that opportunity up and by the acts of the note holders, since 1935, eighty per cent of the lands of the District have been released from liability for the notes. The plaintiff by his activity in obtaining the release of lands and benefit therefrom is estopped to deny such release; and no one can now say that the lands of these defendants received any substantial benefits or how much benefit, if any, they did receive from the construction work that was actually done.

Furthermore, the notes here sued upon are void; because Sec. 2, Chapter 10692, Spec. Acts of 1925, provides for issuance of notes *only after* the letting of a contract for "the full completion of the work provided for by said Plan of Reclamation," and proceeds to validate "such notes as are issued for the purposes mentioned in this section." In connection with the notes sued upon here, no contract was ever let for the full completion of the work provided for by the Plan of Reclamation. Therefore, no deficiency decree could be entered under any circumstances and no judgment is possible against the District upon the notes.

Decree Proper

Therefore, it is considered, ordered, and decreed that for the reasons hereinbefore set forth in the findings of the

Court the levies sought to be foreclosed are void and uncollectible and the same is true of all the notes and warrants upon which it is sought to base this suit. The Bill of Complaint states no ground for equitable relief nor for a judgment against the District as prayed and the plaintiff by his own acts and conduct as hereinbefore described and the acts and conduct of those heretofore in privy with him are barred from maintaining this suit for the relief therein prayed or for any relief based on the allegations of his Bill of Complaint.

The costs to be herein taxed by the clerk shall be paid by the plaintiff and jurisdiction is hereby reserved in the matter of enforcing payment of such costs.

It Is Further Ordered, upon request of attorneys for defendants, that this Decree shall not be construed as canceling and removing the liens appearing of record against the lands described in the Bill of Compaint, but a further order to that effect may be entered upon motion of any or all of such landowners, through their attorneys of record in this cause, showing that all attorneys' fees and costs incurred or payable by them or their predecessors in title in the defense of this cause, have been paid; and jurisdiction is retained to hear and determine any questions that may arise between the attorneys for the defendants herein and the owners of any lands proceeded against in this action relating to the imposition and payment of costs and attorneys' fees and taxing the same against the lands.

Done and Ordered at Bartow, Florida, this 17th day of August, 1949.

Don Register,
Judge.

APPENDIX E

IN THE CIRCUIT COURT, IN AND FOR HIGHLANDS COUNTY, FLORIDA, IN CHANCERY

Case No. 5561

G. C. WESTERVELT, *Plaintiff*,

vs.

ISTOKPOGA CONSOLIDATED SUB-DRAINAGE DISTRICT, ET AL., *Defendants*

ORDER

The above stated case came on this day to be heard upon petition of Defendant for rehearing, and the Court having heard argument of counsel and duly considered the said petition, now

ORDERS AND DECREES that the same be and is hereby denied.

DONE AND ORDERED at Wauchula, Florida, this 13th day of September, 1949.

(S.) DON REGISTER,
Judge.

APPENDIX F

SUPREME COURT OF FLORIDA, DIVISION B

WESTERVELT

v.

ISTOKPOGA CONSOLIDATED SUB-DRAINAGE DIST., ET AL.

May 28, 1946

On Rehearing Oct. 18, 1946

1. Limitation of Actions.

Where petition alleged that obligations involved were under seal, except one which was executed within the last

five years, defense of five year limitations was not available.

2. Limitation of Actions.

In suit by holder of obligations of sub-drainage district to foreclose for district, liens of district on certain lands for failure of district to bring suit to collect delinquent taxes, limitation period applicable to obligations themselves did not apply. Acts 1931, c. 14736, Section 25; F.S.A. Section 298.01 et seq.; Sp. Acts 1925, c. 10692.

3. Drains.

The statute authorizing sub-drainage district to borrow money and execute negotiable notes for money so borrowed does not contemplate that notes should be signed by all members of district board, and when notes were issued bearing corporate seal and signed variously by president and secretary-treasurer, secretary-treasurer, secretary, president and secretary, and by treasurer and one merely by an individual, who on other notes was designated as secretary or as treasurer, signatures were sufficient. Sp. Acts 1925, c. 10692, Section 2.

4. Pleading.

In construing pleading that notes issued by sub-drainage district were not issued by proper authority, court would indulge presumption, against pleader, that corporate seal was affixed to notes at direction of board of supervisors and that officer who actually signed was empowered to execute the instruments to bind the district. Sp. Acts 1925, c. 10692, Section 2.

5. Drains.

In suit by holder of sub-drainage district obligations to foreclose for the district, its liens against certain lands for failure of district to collect delinquent taxes, if any one of them was valid, plaintiff was qualified to sue. Acts 1931, c. 14736, Section 25; F. S. A. Section 298.01 et seq.

6. Drains.

Challenge to validity of notes of sub-drainage district on the ground that they were not issued to secure money to pay expenses of organizing district, effecting plan of reclamation, and the like, and other grounds such as failure of all members of board to sign them and their issuance after enactment of consolidation act were not tenable as a defense to action by holder of district's obligations to foreclose for the district, liens on certain lands for failure of district to collect delinquent taxes. Acts 1931, c. 14736, Section 25; F. S. A. Section 298.01 et seq.; Sp. Acts 1925, c. 10692.

7. Drains.

Allegations chronicling certain actions of board of supervisors of sub-drainage district toward passage of consolidation act in order that financing might be secured through Reconstruction Finance Corporation, Federal Emergency Administration or the Civil Works Administration did not state a defense to an action by holder of obligations of district to foreclose certain liens on behalf of district for failure of district to collect delinquent taxes. Acts 1931, c. 14736, Section 25; F. S. A. Section 298.01 et seq.; Sp. Acts 1925, c. 10692.

8. Drains.

The statute pertaining to sub-drainage districts is not unconstitutional in so far as it pertains to continuance of plans of reclamation after consolidation of sub-drainage district or as to inclusion of new territory and continuance of a third plan for that area or as to composite pattern of reclamation. Acts 1931, c. 14736.

9. Drains.

In action by holder of obligations of sub-drainage district to foreclose for the district, liens on certain land for failure of district to collect delinquent taxes, allegations concerning a federal court litigation between other parties

did not state a defense. Acts 1931, c. 14736, Section 25; F. S. A. Section 298.01 et seq.; Sp. Acts 1925, c. 10692.

Certiorari from Circuit Court, Highlands County; Don Register, Judge.

Suit by G. C. Westervelt against Istokpoga Consolidated Sub-Drainage District and others to foreclose certain liens of defendant district in plaintiff's capacity as a holder of obligations of district. To review chancellor's order denying plaintiff's motion to strike certain paragraphs of the answer, plaintiff brings certiorari.

Petition granted and order quashed.

Lewis E. Purvis, of Arcadia, and J. Lewis Hall, of Tallahassee, for petitioner.

Mabry, Reaves, Carlton, Anderson & Fields, of Tampa, for respondents.

THOMAS, Justice:

The questions involved in this controversy are presented to us by petition for certiorari to review the ruling of the chancellor that certain parts of the answer withstood a motion to strike them.

The suit was brought by appellant, under authority of Section 25 of Chapter 14736, Laws of Florida, Acts of 1931, to foreclose liens of the appellee-sub-drainage district on certain lands, he being the owner of nearly $200,000 worth of its obligations, and the district having failed to bring suit to collect delinquent taxes.

According to the allegations of the bill, Istokpoga Sub-Drainage District was organized under the general drainage laws enacted in 1913, Chapter 6458, Laws of Florida, now Chapter 298, Florida Statutes, 1941 and F. S. A., and continued to function as a drainage district until 1931 when, by Chapter 14736, supra, enacted that year, it and a district known as Indian Prairie Sub-Drainage District were abolished and the lands located in the former were incorporated in the Istokpoga Consolidated Sub-Drainage District.

By Chapter 10692, Laws of Florida, Special Acts of 1925, the original district had been empowered to borrow money, to complete the work contemplated in the plan of reclama-

tion, and to execute promissory notes as evidence of the indebtedness.

The obligations held by the appellant fall, roughly, into three classes: (1) 29 notes of Istokpoga Sub-Drainage District; (2) 14 notes of the consolidated district; and (3) 9 warrants. The instruments in the first class are signed variously by the president and secretary-treasurer, the secretary-treasurer, the secretary, the president and secretary, the treasurer, and (one of them) by W. H. Hylton, he being the person who on all the others was described either as treasurer, secretary, or secretary and treasurer. Each of the fourteen notes executed by the consolidated drainage district was signed by this same person, who was described on each of them as secretary-treasurer. All nine warrants were signed by G. C. Westervelt, "Acting President of District," and purported to be the obligations of Istokpoga Consolidated Sub-Drainage District. All fifty-two of the instruments bore the corporate seal except the last one, which was issued December 20, 1941.

From our perusal of the record we have concluded that there is need only for us to discuss the defenses which are set out in paragraphs 1-A to 10-A of the answer of certain of the individuals who were joined as defendants with Istokpoga Consolidated Sub-Drainage District.

(1, 2) In three paragraphs of the answer (3-A, 4-A, and 9-A) the defendants alleged that the obligations which we have described were barred by the statute of limitations because the cause of action did not accrue within five years. Even were this defense available in an action on the obligations, in view of the facts alleged that all of the obligations were under seal save one which was executed within the last five years, it is inappropriate in this suit, which is not one based on failure to pay the indebtedness. We find in referring again to Section 25 of Chapter 14736, supra, that tax liens declared in the preceding sections may be enforced in a certain manner, and that the duty is imposed upon the board of supervisors to institute suits against lands on which the drainage taxes have not been paid. In the event suit is not instituted by the district to enforce the collection of delinquent taxes, then the holder of any

bond or note has the right to sue and to make the district a party defendant. Proceeds of sales made pursuant to final decrees entered in such suits must be paid to the treasurer of the district and "accounted for by him the same as the drainage taxes." As we have already pointed out, the bill in the instant case contained a prayer that the court determine the liens of the consolidated sub-drainage district upon the various portions of land affected by the litigation and that the land be sold to satisfy any decree entered.

It is obvious that this is not primarily a suit upon the notes and warrants now in the hands of the appellant, but that it is one by him, in lieu of the district, to foreclose the liens which the district has failed to foreclose, and that the description of the indebtedness in the bill served principally to show that he is qualified to bring the action under Section 25, supra. It should be borne in mind that the answer with which we are dealing is not one of the district, but of the owners of land on which the drainage taxes have not been paid.

(3, 4) It may be advisable for us to discuss the question raised (in paragraph 8-A) that the appellant had no right to bring the suit because he was not in fact a "holder of any bond or bonds or note or notes issued by the district," the instruments we have detailed not having been signed by the supervisors of said drainage district. All notes executed by the original district were authorized under Section 2, Chapter 10692, supra, in which it was provided that the district could "borrow money * * * and * * * execute * * * promissory negotiable notes of said District for money so borrowed * * *." We have found nothing in this act which required that each of the notes should be signed by all members of the board, and it is our view that when they were issued, bearing the corporate seal and signed as we have already described, there was a sufficient compliance with the law. We shall indulge the presumption, against the pleader, that the corporate seal was affixed at the direction of the board of supervisors and that the officer who actually signed was empowered to execute the instruments to bind the district.

(5) We see no reason to discuss the several notes and warrants with respect to the manner and time of execution, as we are convinced that all were not invalid, if any of them were, and if any one of them was valid, appellant was qualified to sue, for, again quoting Section 25 of Chapter 14736, supra, "the holder of any bond or * * * note" may institute foreclosure.

(6) In paragraph 1-A of the answer the defendants gave a rather extended account of the doings of the board of supervisors as reflected by the minutes from the year 1924 until the year 1931 when the district was consolidated, as we have explained. This portion of the pleading, taken alone, does not indicate just what was relied upon as a defense to the suit, but when it is considered in connection with paragraphs 2-A and 5-A it seems to constitute a challenge to the validity of the notes because they were not issued to secure money to pay expenses of organizing the district, effecting the plan of reclamation, etc. Here again we find a challenge to the validity of the obligations on the various other grounds, such as the failure of all members of the board to sign them and their issuance (in the case of obligations of the original district) after the enactment of the consolidation act. Many of the points raised in these paragraphs of the answer have been disposed of by the comment we have already made, and we think the others are not tenable in view of what we wrote in Baldwin Drainage District v. Macclenny Turpentine Co., 154 Fla. 525, 18 So. 2d 792.

The record does not disclose a paragraph designated "6-A."

7, 8) In paragraph 7-A there appears a chronicle of certain actions of the board of supervisors toward the passage of the consolidation act in order that financing might be secured through Reconstruction Finance Corporation, the Federal Emergency Administration or the Civil Works Administration. We do not find that in its present form this part of the answer presents a defense, and we think it should have been stricken. It concludes with an attack on the constitutionality of Chapter 14736, supra, but from the grounds on which the assault was based—that is, (1) con-

tinuance of the plans of reclamation after consolidation (2) inclusion of new territory and continuance of a third plan for that area, and (3) the criticism of the composite pattern of reclamation—we are far from convinced that the act offends against the Constitution. Counsel for appellees admit in their brief that the act is "in the main" constitutional.

(9) Paragraph 10-A is introduced with allegations that certain properties in the district have been released for the payment of sums in varying amounts, supposedly by the surrender of past-due obligations instead of the payment of cash. The pleaders follow this by giving the details of a suit by one Edward Major Campbell in the federal court against the board of supervisors seeking the appointment of a receiver. Sometime after that, so the averments continued, a receiver was appointed, and eventually the judge of the district court authorized the receiver to accept obligations for payment of assessments upon a reduced basis. Apparently one of those taking advantage of the discount was a company of which the present appellant was president. The defendants admit that although not parties to the cause in the federal court they were given opportunity to compromise their claims also, but they now complain that their property could not in good conscience be charged with any sum. It has not been made clear to us what bearing this litigation in the federal court has upon the present controversy.

We hold the conviction that paragraphs 1-A to 10-A (except 6-A which seems to have been omitted) of the answer should have been stricken, and we therefore grant the petition for certiorari and quash the order of the chancellor denying the motion to strike them.

CHAPMAN, C. J., and BROWN and SEBRING, JJ., concur.

On Rehearing.

PER CURIAM:

A rehearing having been granted in this cause and the case having been further considered upon the record and upon the briefs and argument of counsel for the respective

parties; it is thereupon ordered and adjudged by the Court that the judgment of this court filed herein on May 28, 1946, holding that paragraph 1-A to 10-A (except 6-A which seems to have been omitted) of the answer should have been stricken, and granting petition for writ of certiorari and quashing the order of the chancellor denying motion to strike them, be and it is hereby reaffirmed and adhered to on rehearing.

CHAPMAN, C. J., TERRELL, BROWN, BUFORD, and THOMAS, JJ., and BARNS, Associate Justice, concur.

ADAMS, J., not participating.

APPENDIX G

WESTERVELT v. ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT, ET AL.

Supreme Court of Florida, en Banc.

June 4, 1948

Rehearing Denied June 25, 1948

1. Equity.

A motion to strike from an answer in equity any part of it which may be deemed to be redundant, impertinent, or scandalous must be denied unless matter sought to be stricken is wholly irrelevant, can have no bearing upon equities, and can have no influence upon decision, either as to relief to be granted or allowance of costs. F. S. A. Section 63.23.

2. Courts.

Where Supreme Court on certiorari quashed an order denying plaintiff's motion to strike certain paragraphs of answer and, in order that law of case might not be applied, decreed that opinion should be without prejudice to leave of defendants to file an amended answer and counterclaim

going to the equities of the cause, under terms of former opinion and in light of principles of equity pleading, petition for certiorari to review order denying plaintiff's motion to strike certain portions of answer on the ground that matters sought to be stricken did not constitute a defense and were contrary to law of case was denied. F. S. A. Section 63.23.

3. Certiorari.

The denial of plaintiff's petition for certiorari to review order denying motion to strike certain parts of defendant's answer reserved unto petition all benefits and advantages of any insufficiencies of answer which were defensive in nature.

THOMAS, C. J., and SEBRING, J., dissenting in part.

Certiorari to Circuit Court, Highlands County; Don Register, Judge.

Suit by G. C. Westervelt against Istokpoga Consolidated Subdrainage District and others to foreclose certain liens of defendant district in plaintiff's capacity as a holder of obligations of district. To review chancellor's order denying plaintiff's motion to strike certain portions of defendant's answer, plaintiff brings certiorari.

Certiorari denied.

Lewis E. Purvis, of Arcadia, and J. Lewis Hall, of Tallahassee, for petitioner.

Mabry, Reaves, Carlton, Anderson, Fields & Ward, of Tampa, for respondents.

PER CURIAM.

The Chancellor has denied plaintiff's motion to strike certain portions of defendant's answer, and plaintiff now seeks to have the order reviewed on certiorari.

The petitioner bases his motion for reversal of the order of the Chancellor upon the ground that the matters sought

to be stricken do not constitute a defense and are contrary to the law of the case established by the decision in this same case on a prior appeal, as reported in 158 Fla. 214, 28 So. 2d 859.

In finally disposing of the former appeal and in order that the law of the case might not be applied by reason of the reported opinion this Court decreed that its opinion should be: "• • • without prejudice however to leave of the appellees to file an amended answer and counterclaim going to the equities of the cause."

(1) Relative to answers in equity, this Court in Gossett *v.* Ullendorff, 114 Fla. 159, 154 So. 177, 179, stated:

"The motion to strike from an answer any part of it which may be deemed to be redundant, impertinent, or scandalous is controlled by the rule which requires the denial of the motion unless the matter sought to be stricken is wholly irrelevant, can have no bearing upon the equities and no influence upon the decision either as to the relief to be granted or the allowance of costs. See section 23, chapter 14658, Acts 1931, known as the Chancery Act (F. S. A. Section 63.23)."

The principles of equity pleading above enunciated have recently been re-affirmed by the case of Schupler *v.* Eastern Mortgage Co., Fla., 33 So. 2d 586.

(2, 3) The petition for certiorari is denied. This will save and reserve unto the petition all the benefits and advantages of any insufficiencies of the answer which are defensive in nature. It is further observed that by reason of the probability of another appeal to this Court from the final decree and by reason of the complications involved it appears that it would be a great saving of expense and time if the Chancellor, when entering the decree, should make a finding of fact on the material matters affecting the equities of the parties.

TERRELL, CHAPMAN, ADAMS and BARNS, JJ., concur.

THOMAS, C. J., and SEBRING, J., concurring in part and dissenting in part.

STATE OF FLORIDA,
County of Volusia:

On this day personally appeared before me, Sara Ann Brannen, to me well known, who being by me first duly sworn, did depose and say as follows:

I am employed in the law office of D. C. Hull, counsel for the appellant in this cause. On the — day of ——, A. D. 1951, I mailed to Mr. Chester H. Ferguson, counsel for the appellee, Istokpoga Consolidated Sub-Drainage District, and to Messrs. Mabry, Reaves, Carlton, Anderson, Fields and Ward, counsel for the land-owning appellees, each a true and complete copy of the above and foregoing statement as to jurisdiction, such respective copies being enclosed in envelopes bearing the requisite amount of uncancelled United States postage stamps, the said envelopes being addressed respectively as follows:

Mr. Chester H. Ferguson,
Attorney at Law,
First National Bank Building,
Tampa 1, Florida.

Messrs. Mabry, Reaves, Carlton,
Anderson, Fields and Ward,
Attorneys at Law,
First National Bank Building,
Tampa 1, Florida.

The said respective envelopes were properly sealed, stamped, addressed as aforesaid, and deposited in the post office at DeLand, Florida.

The addresses on the said envelopes are the usual post office addresses of the counsel for the appellees in this cause.

—— ——.

Sworn to and subscribed before me this — day of ——, A. D. 1951.

—— ——,
Notary Public,
State of Florida at Large.

[Notarial Seal.]

My commission expires: —— ——.

Office-Supreme Court
FILED
MAR 30 19
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 648

G. C. WESTERVELT,

Appellant,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT, A FLORIDA DRAINAGE CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

O. K. REAVES,
DAVID E. WARD,
DOYLE E. CARLTON,
Counsel for Appellees.

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IN THE

SUPREME COURT OF THE STATE OF FLORIDA

G. C. WESTERVELT,

Appellant,

vs.

ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT, A FLORIDA DRAINAGE CORPORATION, ET AL.,

Appellees.

STATEMENT OF NON-JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The United States Supreme Court does not have jurisdiction because:

1

No substantial federal question is presented or involved.

2

The decree of the State Court appealed from holds that *the alleged obligations* of the drainage district held by appellant Westervelt (notes and warrants) *are void* because of failure of officers of the drainage district to comply with essential requirements of State statutes other than, and unrelated to, Chapters 17072 and 17073 *which apply only to annual tax levies* (tr. 817-820, Appendix D, pages 37-42 of "Statement as to Jurisdiction"), hence, said decree, or the equities in said cause, do not turn upon the asserted federal question.

3

The State Court decreed that the said notes and warrants are void and uncollectible by appellant for ten or more

stated reasons unrelated to said chapters. (Section 3, pages 813-815 of the record, Appendix D, pages 37-38 of "Statement as to Jurisdiction.")

4

The numerous facts found by the State Court to be so violative of statutes other than, and unrelated to, said Chapters 17072 and 17073, and of controlling principles of equity as to render the notes and warrants owned by appellant void and uncollectible and make the attempted annual levies void, show that the claimed federal question is unsubstantial and that the decree did not, and does not, turn upon said federal question.

5

To collect the said annual tax levies of 1926, 1927, and 1928, which appellant seeks to do, would violate due process of law (and obligation of contract between the district and defendant land owners) since said assessments were made in anticipation of, and conditioned upon, the completion of the plan of reclamation, and the amounts levied were based upon the benefits

> "that *will accrue* to each" tract of land "*from carrying out and putting into effect 'the plan of reclamation' theretofore adopted,*" (Emphasis ours) (Sec. 1463, Compiled General Laws of Florida.)

and the State Court found that the said plan of reclamation was less than one-third completed, that it could not be completed and was abandoned many years before this suit was filed, and that the drains dug did not benefit the defendants' lands (tr. 817, 805-806, Appendix D, pages 39-40, 29-30 of "Statement as to Jurisdiction.") Therefore, said Chapters 17072 and 17073 provided the only means whereby the district could raise money.

6

This case is not of general or public interest because the alleged federal questions are based solely upon local statutes applicable only to one designated, and now dead, drainage district, hence, the question is not a substantial one.

7

The record shows clearly that a review of this case could only result in an affirmance.

In order that the Court may clearly understand and better apply the foregoing grounds of non-jurisdiction, it seems expedient to state more fully what the law required to be done and what was actually done in the matter of the said drainage districts. It seems probable, however, that after reading the Circuit Judge's opinion and decree (tr. 801, Appendix D to "Statement as to Jurisdiction") which the Florida Supreme Court "*affirmed*" without opinion, the United States Supreme Court will not care to look further.

All of the statutes listed as involved in appellant's statement of jurisdiction are local, relating only to the Istokpoga Sub-Drainage District and the Istokpoga Consolidated Sub-Drainage District, except that the Istokpoga Sub-Drainage District was originally formed under General Drainage Law namely Chapter III relating to drainage of swamp and overflowed lands, being Sections 1451 et seq. of the Compiled General Laws of Florida. Some of said local statutes are erroneously reported in volumes entitled "General Laws" rather than in the "Special Acts", but that does not change their character.

Said General Drainage Law provides that drainage districts may be formed by petition filed in the Circuit Court, signed by the majority of owners, or acreage, of lands to be incorporated in the district. Notice is published to interested parties and an opportunity afforded to be heard in op-

position, whereupon the court establishes the district or dismisses the petition. The governing board of such a district is called the Board of Supervisors, consisting of three members elected annually by the owners of a majority of acres in the district. The Board of Supervisors is authorized to employ an engineer and to prepare and adopt a plan of reclamation. To finance the preliminary work, the statute, Section 1460, provides that the Board

> "shall, as soon as they have organized as provided under Section 1457, levy a uniform tax of not to exceed 50 cents per acre upon each acre of lands within such drainage district as defined in the petition and decree incorporating said district, to be used for the purpose of paying expenses incurred or to be incurred in organizing said district, making surveys of the same and assessing benefits and damages, and to pay other expenses necessarily incurred, as may be estimated by said board and chief engineer, before said board shall be empowered by subsequent provisions of this Article to provide funds to pay the total costs of works and improvements of the district."

No such tax levy was made in the Istokpoga case. Sections 1462 and 1463 empower a *Board of Commissioners,* after the plan of reclamation has been adopted, to view the lands and

> "they shall assess the amount of *benefits* and the amount of damages also, if any, *that will accrue* to each governmental lot, forty-acre tract, or other subdivision of land (according to ownership), public highways, railroads and other rights of way, not traversed by such works and improvements, *from carrying out and putting into effect the plan of reclamation theretofore adopted.*" (Emphasis ours.)

The plan of reclamation in the case at bar was never carried out or put into effect, but was abandoned. The plan

called for designated drains requiring the excavation of 4,250,000 cubic yards of earth, while the work actually done consisted of only 1,342,000 cubic yards (findings of the Circuit Judge, tr. 809, Appendix D, pages 33 of "Statement as to Jurisdiction"), and the drains constructed were remote from and of no benefit to defendants' lands.

Section 1467 provides that after the lists of lands, with the assessed benefits and the decree of the court confirming the same have been filed in the office of the clerk of the Circuit Court,

> "the Board of Supervisors shall, without any unnecessary delay, levy a tax of such portion of said benefits on all lands in the district to which benefits have been assessed as may be found necessary by the Board of Supervisors to pay the costs of the completion of the proposed work and improvements, as shown in said plan of reclamation and in carrying out the objects of the district, and in addition thereto ten per cent of said total amount for emergencies. *The said tax shall be apportioned to and levied on each tract of land in said district in proportion to the benefits assessed and not in excess thereof.*" (Emphasis ours.)

This is called the "total tax" and is required to be recorded and preserved in a book named "Drainage tax record of —— drainage district —— County, Florida."

Section 1468 provides that

> "The Board of Supervisors shall *each year thereafter* determine, order and *levy the amount of the annual installments of the total taxes levied* under the preceding section, which shall become due and be collected during said year at the same time that State and county taxes are due and collected, which said annual installment and levy shall be evidenced and certified by the said board not later than November 1st of each year to the collector of each county in which lands and other

property of said district are situated," etc. (Emphasis ours.)

Section 1469 makes it the duty of the tax collector of the county to collect said annual installments at the time other taxes are collected, and penalties are provided for the failure of the property owners to pay.

The sections following provide that the taxes so assessed shall constitute a lien upon the properties and that they shall be collected by foreclosure if necessary.

The Istokpoga Sub-Drainage District was organized with an area of 102,000 acres, of which Istokpoga Farms, a corporation, owned approximately 33,000 acres, and Howard Cole & Co., 60,000 acres. The remaining 9,000 acres were owned by half a dozen or so individuals. Shortly after the district's formation, Howard Cole & Co. sold 33,000 acres to Curtiss-Bright Co. (Opinion, Circuit Court, tr. 803, Appendix D, page 27 of "Statement as to Jurisdiction.")

The first Board of Supervisors of said district consisted of E. J. Etheredge and W. H. Hylton, the principal officers and owners of Istokpoga Farms, and James H. Bright, president of the Curtiss-Bright Co. They continued until the consolidated district was formed in 1931, when Bright retired. Hylton and Etheredge continued as supervisors under the consolidated district until Hylton retired in June 1937, and Etheredge in June 1939. Each was succeeded by another large land owner elected by a majority of the owners in acreage. Two corporations at all times during the life of the old Sub-Drainage District owned the acreage majority and hence controlled the district (Circuit Court decree, tr. 803, Appendix D, pages 27-28 of "Statement as to Jurisdiction") and appellant Westervelt was a stockholder and officer in one or the other of them at practically all times after July 1927 (tr. 316-317). Being unable to find

a buyer for proposed bonds of the district, the Board of Supervisors had their attorney draw and procure the passage by the legislature of a special act, Chapter 10692, Special Acts of 1925, providing in Section 2 that

> "The Board of Supervisors of the Istokpoga Sub-Drainage District are hereby authorized and empowered at their discretion upon the adoption of a plan of reclamation for said district to immediately *in the manner and form required by law* to enter into a contract *for the full completion of the work provided for by said plan of reclamation,* and in the event of letting of said contract at the time aforesaid, the Board of Supervisors of said Istokpoga Sub-Drainage District are authorized and empowered to borrow money for the purpose of paying for such work and to execute and deliver the promissory negotiable notes of said district for money so borrowed or to execute and deliver direct to the purchaser the promissory notes of said district for the work done by such contractor in pursuance of the plan of reclamation aforesaid. All moneys paid said contractor or all notes given to such contractor shall be paid or given upon estimates to be made by the chief engineer of said district as provided by the General Laws of Florida, the maturity of such notes to be fixed by the Board of Supervisors of the said Istokpoga Sub-Drainage District at such time as in their opinion may be best, said notes to be retired upon the sale of the bonds to be issued by said district and the receipt of the proceeds of said sale.
>
> "And in the event the notes of said district are issued for the purposes mentioned in this section, the same shall be the binding legal obligations of said district and the same are hereby validated and confirmed." (Emphasis ours.)

Purporting to act under this section, the Board of Supervisors let a contract (without taking bond to secure its performance) to one Morgan for the construction of part only

of the work provided for, namely 3,143,196 cubic yards out of a total required by the plan of reclamation of 4,250,000, and only 1,342,000 cubic yards covered by the contract were excavated. (Circuit Court's decree, tr. 805, "Statement as to Jurisdiction" Appendix D, pages 29-30.) The court held that all notes issued under that contract were void because of the failure to comply with statutory conditions precedent. Pretended annual levies which the court also held to be void were made for the years 1926, 1927, and 1928. The district was never able to sell bonds or otherwise finance, so the contractor abandoned the work in April 1927, and the plan of reclamation remains incomplete until this date and was long since abandoned.

The plaintiff Westervelt came into the picture in 1927 as a stockholder and representative of the Curtiss-Bright Co. to try to finance the project. He formed the Palm & Pine Land Company which acquired the 33,000 acres owned by Istokpoga Farms. The plaintiff Westervelt practically took the district over in 1927 and continued to control it. The Board of Supervisors did what he said. He conceived the idea of enlarging the district and hence fathered the Act of 1931 consolidating the Istokpoga Sub-Drainage District, the Indian Prairie District, and additional lands. He became chief engineer of the consolidated district in 1931 as soon as it was formed and continued as such until in the late 40's shortly before the final decree in this case was handed down. In the summer of 1935 he was elected a member of the Board of Supervisors and continued as such for three years. He avers in his bill of complaint that he owns all of the obligations issued by the Sub-District and the Consolidated District. Said so-called obligations, giving the names of original owners, date, maturity date, amount, etc. are listed on pages 6, 8 and 9 of the transcript. While many of them were originally issued to Westervelt, he

testified that all were owned by the Palm & Pine Land Company during the period of the federal receivership and that he (Westervelt) acquired them very shortly before this suit was filed (tr. 422). All said obligations were long past due at that time, hence Westervelt is not a bona fide holder for value. Moreover, all the notes were originally issued to or thereafter acquired by members of the Board of Supervisors or corporations officered by them with whom Westervelt was in privity and of whom he was one. Hence, he is chargeable with, and actually had, full knowledge of the invalidating circumstances of all said notes. The State Court so found and decreed. Moreover, the notes and warrants originally issued to Westervelt and his corporation, Palm & Pine Land Company, were for money advanced "for administrative expenses." (Circuit Court decree, tr. 805, Appendix D, page 28 of "Statement as to Jurisdiction.") There never was statutory authority for issuing notes or borrowing money for such purposes.

Before bringing this suit, Westervelt as president and manager of the Palm & Pine Land Company and later in his own right after he acquired the obligations, made various compromises, settlements, and purported releases with different land owners. The State Court's decree points out that the Palm & Pine Land Company through Westervelt as president, obtained the appointment of a receiver in the Federal Court and obtained a court order under which compromises might be made and land released, but that the Federal Court had no jurisdiction because

(1) The plaintiff in that case, one Campbell, was not the real owner of obligations of the drainage district which he averred he owned but the same had been loaned him for the purpose of bringing the suit, and

(2) Soon after the suit was brought, the Palm & Pine Land Company and other creditors, all citizens of Florida,

intervened with the consent of the plaintiff, and claimed and obtained the same relief the plaintiff prayed for. (Circuit Court decree, tr. 816, citing *Johnson* v. *Riverland Levee District*, (8th Cir.) 117 Fed. 2d 711, Appendix D, page 39 of "Statement as to Jurisdiction.")

The plaintiff Westervelt claims the right to maintain this suit in the State Court because the district had not sued, and that therefore he as a creditor, had the right to sue. Two ultimate propositions were, therefore, before the State Court: (1) Was Westervelt, the plaintiff, a creditor of the district, and (2) Were the alleged annual tax levies which he sought to have foreclosed valid and enforceable? It seems obvious that the constitutionality vel non of the two Acts of 1935 as construed by the State Court has nothing to do with the question of whether the so-called obligations held by the plaintiff were valid and enforceable so as to make him a creditor. The State Court held that

> "the notes here sued upon are void; because Sec. 2, Chapter 10692, Spec. acts of 1925, provides for issuance of notes only after the letting of a contract for 'the full completion of the work provided for by said Plan of Reclamation,' and proceeds to validate such notes as are issued for the purposes mentioned in this section.' In connection with the notes sued upon here, no contract was ever let for the full completion of the work provided for by the Plan of Reclamation. Therefore, no deficiency decree could be entered under any circumstances and *no judgment is possible against the District upon the notes.*" (Emphasis ours.)

(Circuit Court decree, tr. 819, "Statement as to Jurisdiction," Appendix D, page 41.) In the face of this holding founded entirely upon State law, it seems perfectly clear that the effect, if any, upon the annual levies of taxes required by the Acts of 1935 complained of, would not change the result of this case.

"The Federal Supreme Court will not review a State Court decision resting on an adequate non-federal ground, though the decision also rests upon an erroneous view of federal law."
Headnote 6.

"The Federal Supreme Court cannot consider the correctness of the non-federal ground upon which a State Court decision was rested unless it is an obvious subterfuge to evade consideration of a federal issue."
Headnote 8.

Radio Station WOW, Inc. et al., v. *Johnson*, 326 U. S. 120, 65, S. Ct. 1475.

Where the subject matter of the controversy is not inherently federal

"There must be a real substantive question *on which the case may be made to turn*, that is, a real, and not a merely formal, Federal question is essential to the jurisdiction of this Court." (Emphasis ours.)

Equitable Life Assurance Society v. Cecil Brown, 187 U. S. 308, 23 S. Ct. 123.

The alleged federal question is unsubstantial also because the State Court held the alleged assessments sought to be foreclosed, namely, for the years 1926, 1927, and 1928, invalid for other reasons unconnected with the Special Acts of 1935. The decree (tr. 819) says:

"Therefore, it is considered, ordered, and decreed that for the reasons hereinbefore set forth in the findings of the Court the levies sought to be foreclosed are void and uncollectible," etc.

Turning back to page 813, the opinion says that the Board of Supervisors, from the inception of the Sub-Drainage District, handled its affairs and the affairs of the Consolidated District

> "in their own way and to their own liking, regardless of statutory requirements."

It then enumerates twelve separate and distinct invalidating circumstances, only one of which involves the said Acts of 1935. Then the Court points out on page 814 that it was apparently

> "the oneness of land ownership and District financing and officering that made the Supervisors feel at liberty to ignore the law in so many respects and carry on the affairs of the District in their own way. The plaintiff Westervelt had knowledge of all said matters and things in 1927 and thereafter, and his privies in title had such knowledge from the beginning, which is chargeable to the plaintiff."

Also, the opinion finds unclean hands and other equities against Westervelt.

So it is, that eleven and more invalidating circumstances wholly unconnected with any question of Federal Constitution or statute were found, hence the State Court would obviously reach the same conclusion if the Acts of 1935 are taken out of the case.

The asserted federal question is unsubstantial for the further reason that to enforce the alleged levies of taxes made and apportioned on the basis of the assessed benefits which would have accrued if the plan of reclamation had been completed, considering the fact that it was less than one-third completed and that the canals constructed were so remote from the defendants' lands, as the Court finds, as to be of no measurable benefit to the defendants' lands, would have been a violation of the defendants' constitutional rights.

This suit was brought in September 1945. The work on the plan of reclamation was abandoned in April 1927. It had been definitely known for many years that the drain-

age project never could be carried out. Hence, the benefit from a completed plan anticipated by the assessments could never be realized. We have pointed out that under Section 1463, Compiled General Laws of Florida, the Commissioners were required to

> "assess the amount of benefits . . . *that will accrue* to each governmental lot, forty-acre tract or other subdivision of land . . . *from carrying out and putting into effect 'the plan of reclamation';*" (Emphasis ours.)

hence, said assessments and levies were provisional, and had no binding effect after the plan was not carried out or put into effect. That assessment of benefits with reference to which the annual levies were made, ceased to be the basis for distributing the cost, and the benefits actually received from the incompleted plan had to be substituted. A provision to that effect was made by Chapters 17072 and 17073, General Acts of 1935.

In *Campbell* v. *State*, 133 Fla. 638, 183 So. 340, involving New Smyrna-DeLand Drainage District, the Court said:

> "The power of drainage district to assess and collect taxes is limited to benefits accruing to land located within drainage area."

In *Smith* v. *City of Winter Haven*, 154 Fla. 437, 18 So. 2d 4, involving a special assessment imposed by a municipality, the Court said:

> "A municipality's power to tax for benefits is bounded by its present or reasonably present capacity to replace taxes exacted with a commensurate benefit."

In *Houck* v. *Little River Drainage District*, 239 U.S. 254, 36 S. Ct. 58, it was held that a preliminary assessment of 25 cents per acre in a drainage district was valid, and in discussing the powers of the State, the opinion says that

> "The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners," (citing authorities).

The same principle is declared in *Wagner* v. *Leser*, 239 U. S. 207, 36 S. Ct. 66. These two cases are cited in *Myles Salt Co.* v. *Board of Commissioners*, 239 U.S. 478, 36 S. Ct. 204, which involved a drainage district. It was there held that land which was not benefited could not be assessed. The opinion near the end says:

> "It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. Philip Wagner v. Leser, supra. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The principle involved in the case at bar, where the plan of reclamation was not completed and no part of the plan which would have benefited the lands of defendants was constructed, as the Court found, is the same as that condemned in the above quotations. The incidental facts are different, but the basic fact—absence of benefit—is common to all.

The failure of the Board of Supervisors, of which appellant Westervelt was one, to assess benefits in accordance with the said Acts of 1935, was held by the State Court to

be unfair and to be an act of unclean hands, which, together with other inequitable conduct set forth in the State Court's opinion, barred recovery by the plaintiff on the ground of unclean hands, which was only one of several grounds stated in the opinion why the plaintiff could not recover. Westervelt was not denied due process of law, neither was the obligation of any contract violated. If he had been allowed to foreclose the alleged levies of 1925, 1926, and 1927, the property owning defendents would have been denied due process of law because of benefits anticipated to accrue to their lands by reason of the completion of the plan of reclamation filed. Benefits in the amount levied could never accrue except by *completing* the plan of reclamation, and amounts levied were *conditioned* upon such completion. The law might have allowed the collection of said annual levies (if they had been valid in other respects) to pay for the construction of the plan while construction was in progress. But when it was determined that the plan could never be completed, and it was therefore abandoned without benefiting defendants' lands, the only thing that could be constitutionally done was to make new levies against lands in the district, taking into consideration the incompleteness of the plan of reclamation, and apportioning benefits against the several parcels of land according to what they had respectively received from the partial construction of the plan. That is exactly what the Acts of 1935 required, and without such legislation the district's obligation, then assumed to be valid, could never be paid. So, said legislative acts are constitutional and valid, but if not, the decree of the State Court would nevertheless stand or be repronounced upon non-federal grounds—the decree does not turn upon the asserted federal question.

The "Certificate as to the raising and deciding of the specific federal question", signed by Chief Justice Sebring

of the Florida Supreme Court, will not be accepted by the Supreme Court of the United States as showing that the alleged federal question was necessary to be decided and was actually decided by the Florida Court because

(1) The record shows clearly and unmistakably that said certificate is an error. Such a certificate cannot supply the want of all evidence to that effect in the record. More especially, it cannot be considered in contradiction of the record.

(2) Mr. Chief Justice Sebring did not participate in the final hearing and disposition of said cause in the Florida Court, or upon the petition for rehearing, and the orders of the Florida Court so show, (Appendices B and C to "Statement as to Jurisdiction") and therefore he is not qualified to certify what the Court did or did not consider. Nor was he Chief Justice at that time.

The Florida Supreme Court's opinion, filed August 1, 1950 (Appendix C to "Statement as to Jurisdiction") seems to state the reasons prompting the Court to affirm the opinion of the Chancellor. That this opinion was withdrawn at the request of appellant and the decree of the lower court simply "affirmed", does not show that the mind of the Court had changed. On the contrary, out of apparent deference to the pleas of appellant in his motion for a new trial that his reputation would be injured, etc., the Court withdrew the opinion and adopted that of the Circuit Court, which under Florida law is not published.

The United States Supreme Court has repeatedly held that where a decision of State Court might have been either upon a State ground or a Federal ground, and the State ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it.

Williams v. *Kaiser*, Mo. 1945, 65 S. Ct. 363, 323 U.S. 471, 89 L. Ed. 398. See also *Fox Film Corporation* v. *Muller*, Minn. 1935, 56 S. Ct. 183, 296 U.S. 207, 80 L. Ed. 158; *Lynch* v. *People of New York ex rel. Pierson*, 1934, 55 S. Ct. 16, 293 U.S. 52, 79 L. Ed. 191, *Klinger* v. *Missouri*, Mo. 1871, 13 Wall. 257, 20 L. Ed. 635.

Moreover, we have shown that the decision of the State Court in this instance was not and could not have been upon the alleged federal ground.

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the State Courts on questions of State law. What it does require is that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and not infrequently are designated as 'law of the land' ".
>
> *Hebert et al.* v. *State of Louisiana*, 272 U.S. 312, 47 S. Ct. 103.

Surely, if there had been valid obligations of the drainage district, it would have been consistent with the fundamental principles of liberty and justice to assess the lands in the district in proportion to the benefits they had received from the partial construction of the plan of reclamation as provided in the said Acts of 1935, rather than enforce the levies based on benefits to be received from a completed plan of reclamation and which never accrued.

Motion

Appellees now move the Court to dismiss the appeal upon the several grounds and for the reasons severally set forth in paragraphs 1 to 7, pages 1-3, supra, as amplified and explained in this Statement of Non-Jurisdiction, or to affirm the judgment of the State Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

G. C. WESTERVELT.

Appellant,

vs.

ISTOKPAGA CONSOLIDATED SUB-DRAINAGE DISTRICT, et al.,

Appellees.

APPEAL FROM THE
SUPREME COURT OF THE STATE OF FLORIDA

APPELLANT'S BRIEF OPPOSING MOTION OF APPELLEES TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

The appellees' Statement of Non-Jurisdiction and Motion to Dismiss or Affirm does not take up separately the points advanced as going against the jurisdiction, but is limited to a general discussion.

For this reason, the making of an ordered reply presents a unique problem.

However, seven numbered paragraphs are set forth which seem to present five main contentions:

1. That no substantial federal question is presented or involved (Ground 1 of motion).

2. That, since the decree appealed from holds the notes and warrants issued by the drainage district to be void and uncollectible, the decree did not turn upon the asserted federal question (Grounds 2, 3 and 4).

3. That to collect the annual tax levies sought to be enforced against the lands of the appellees would violate due process of law (and obligation of contract between the district and the defendant landowners) because the plan of reclamation was not completed (Ground 5).

4. That the asserted federal questions are based solely upon local statutes, applicable to only one drainage district, which appellees assert is "now dead," from which they argue that the case is not of general public interest and that the question is not substantial (Ground 6).

5. That a review of the case could only result in affirmance (Ground 7).

OUTLINE OF ARGUMENT

Appellant expects to show by this brief:

I. That a substantial federal question is presented and involved.

II. That, even though the notes and warrants issued by the drainage district were held to be uncollectible, the decree actually turned upon the asserted federal question.

III. That there is no contract relationship existing between a public taxing district and its landowners, which could be impaired, in the constitutional sense, by the bringing of a lawsuit, for the purpose of enforcing the lien of delinquent taxes due and owing to the district, and that due process of law has been afforded to the landowning appellees.

IV. That there is no merit in the contention of the appellees that the asserted federal questions are based solely upon local statutes, applicable to only one drainage district,

which the appellees assert is "now dead," hence, as they say, the case is not of general or public interest and the question is not substantial.

V. That the contention of the appellees that a review of the case could only result in an affirmance is not well-founded.

ARGUMENT

I.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED AND INVOLVED.

The appellant is admittedly a creditor of the Istokpoga Sub-Drainage District and its successor, Istokpoga Consolidated Sub-Drainage District, a Florida corporation, to the extent of more than $200,000.00, all of which indebtedness is evidenced by negotiable promissory notes and warrants of the respective districts.

The major portion of this indebtedness was incurred prior to the enactment of the state legislation the validity of which was brought in question in this case.

These evidences of indebtedness have been stricken down by the state court and declared to be uncollectible, but it is submitted that a careful analysis of the entire decree will clearly demonstrate that such declaration was based fundamentally upon the state court's construction of two state statutes (Chapters 17,072 and 17,073, Laws of Florida, General Acts of 1935), which construction of such statutes renders them unconstitutional and void, and leaves the appellant without any security to which he can resort to enforce payment of the contractual obligations of the district.

Even if the written evidences of the indebtedness are stricken down, the indebtedness itself still remains.

The Constitution of the United States prohibits the several states from depriving creditors of a vested right "without due process of law" and also prohibits the several states from passing laws impairing contractual obligations.

Certainly, we have here a substantial federal question, as

is clearly shown in the appellant's jurisdictional statement. Surely, the Supreme Court of the United States will not permit a litigant's property rights to be taken and destroyed by state legislation, subsequently enacted, which, as construed and applied by the state court, not only impairs, but destroys, the obligation of contracts, and deprives the creditor of vested rights, without due process of law, even though the state court judgement includes so-called "findings" which are unsupported by the evidence introduced in the cause.

The federal questions presented are shown by the assignment of errors and are:

(a) Are not Chapters 17,072 and 17,073, Laws of Florida, General Acts of 1935, as construed and applied by the Circuit Court of Highlands County, Florida, which construction and application were affirmed on appeal to the Florida Supreme Court, unconstitutional and void, in so far as contracts made prior to the effective dates of Chapter 17,072 and 17,073 are concerned, because the legislatures of the several states are prohibited by Section 10, of Article I, of the Constitution of the United States, from enacting any law impairing the obligation of contracts?

(b) Are not Chapters 17,072 and 17,073, Laws of Florida, General Acts of 1935, as so construed and applied, unconstitutional and void, because the cancelling out by Chapters 17,072 and 17,073 of the tax levies sought to be enforced in this proceeding, after indebtedness had been incurred on the strength of such existing tax levies, in which the Florida Supreme Court has held the creditor has a vested right, deprives the creditor of such vested right, without due process of law, in violation of Section 1, of the Fourteenth Amendment, to the Constitution of the United States?

The Circuit Court of Highlands County, Florida, held in this case that Chapters 17,072 and 17,073 completely cancelled out or nullified all the existing tax levies sought to be enforced in this proceeding, which tax levies embrace all the

unpaid annual installments of taxes which have ever been levied or assessed by the Istokpoga district.

And that holding has been affirmed by the Florida Supreme Court.

The proceeds of the drainage district reclamation taxes sought to be enforced in this proceeding are applicable to the satisfaction of liabilities incurred by the drainage district for services rendered to the district in connection with its organiation, maintenance and reclamation activities. Campbell vs. State ex rel Garrett, 124 Fla. 244, 168 So. 33.

"The reclamation tax may be used for all reclamation purposes, attorney's fees, and other obligations of the district." State ex rel Vanse Agnew vs. Johnson, 112 Fla. 7, 150 So. 111.

The contract of a creditor of a municipality or other public corporation debtor includes the laws in force at the time when the contract was made. Sturges vs. Crowinshield, 4 Wheat. 122, W. B. Worthen Co. vs. Kavanaugh, 295 U.S. 56, 55 Sup. Ct. 555, 556.

The tax is the security for an indebtedness incurred by a public corporation debtor.

"The annual tax * * * could not be afterwards severed from the contract without violating its stipulation, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction." Louisiana vs. Pilsbury, 105 U.S. (15 Otto) 278, 26 L. Ed. 1090.

Where a municipality or other public corporation debtor incurs obligations, then, as long as it exists, laws are void which withdraw or restrict its taxing power so as to "impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment." Wolff vs. New Orleans, 103 U.S. (13 Otto) 358, 366.

When a municipality incurs an indebtedness under authority to levy and collect taxes for its payment, the legislature is without constitutional power to repeal or withdraw a portion

of the taxing power until the contract is satisfied. Von Hoffman vs. Quincy, 71 U.S. (4 Wall.) 538, 18 L. Ed. 403.

The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the contract is to that extent weakened. Louisiana vs. New Orleans, 102 U. S. (12 Otto) 203, 206, 26 L. Ed. 132.

A state cannot so change the existing tax laws of the state as to "postpone," "retard," "hinder," or "embarrass" tax collections pledged for debt payments, even though complete frustration is neither attempted nor accomplished by the measures adopted. Louisiana vs. New Orleans, 102 U.S. (12 Otto) 203, 26 L. Ed. 132.

But in this case complete frustration is accomplished. For, the decree of the Circuit Court, affirmed on appeal, not only holds that the tax levies sought to be enforced are completely cancelled out by the legislation here brought in question, they being all the unpaid taxes that have ever been levied by the district, but that, under that legislation, the duty devolved upon the Supervisors in 1935 to adjust such previously made levies, and that, as they did not make the adjusted assessments and attempt to collect them, no decree for the plaintiff (appellant) "would be possible where the Court finds that there is no lien against the lands for the alleged obligations sued upon, as in this case." (See typewritten pages 21 and 22 of Appendix D to Appellant's Statement as to Jurisdiction).

It is submitted that, after the assesment of benefits was made and cofirmed, and after the assessments were validated by the legislature, and after the annual installments of taxes for the years 1926, 1927 and 1928, based upon the assessment of benefits, were levied, and after contract obligations were incurred, payable from such reclamation taxes, the 1935 legislature could not require the adjustment "by reduction," of

all these existing annual levies, so as to make such levies proportionate to the benefits received to that date from the partially completed plan, by "cancelling out the old levies and making new levies according to the benefits received up to that time," and could not, by merely "passing a law," render the existing tax liens in which the appellant had a vested right, "void and uncollectible," because the cited provisions of the federal constitution prohibited it from doing so.

The creditor "acquired a vested right in the assessment and levies as made." State ex rel Neafie vs. Board of Commissioners of Everglades Drainage District, 139 Fla. 559, 190 So. 712, 716.

The State of Florida is prohibited from depriving the creditor of a vested right "without due process of law." Section 1, of the Fourteenth Amendment, to the Constitution of the United States.

The federal guaranty of due process extends to state action, whether it acts through its judicial, its legislative, or its administrative branch. Shelley vs. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836.

The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation. Wheeling Steel Corp. vs. Glander, 337 U.S. 562, 69 Sup. Ct. 1291.

It is urged by appellees that there are non-federal grounds sufficient to sustain the decree appealed from in view of the findings of fact contained in the decree of the Circuit Court. We realize that the Supreme Court of the United States will not ordinarily exert its jurisdiction merely to review a decision of a state court upon a question of fact. However, there are exceptions to the rule. The Supreme Court will review a state court's findings "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal

question, to analyze the facts." Fiske vs. Kansas, 274 U.S. 380, 385-6, 47 Sup. Ct. 655, Creswill vs. Grand Lodge, 225 U.S. 246, 261, 32 Sup. Ct. 822, Sterling vs. Constantin, 287 U.S. 378, 398, 53 Sup. Ct. 190. And the Supreme Court is free to make an independent examination of the facts, when it is necessary to do so, in order to decide whether a person has been deprived by a state of a fundamental right secured by the constitution. Norris vs. Alabama, 294 U.S. 587, 590, 55 Sup. Ct. 579, Chambers vs. Florida, 309 U.S. 227, 228-9, 60 Sup. Ct. 472, Ashcraft vs. Tennessee, 322 U.S. 143, 147-8, 64 Sup. Ct. 921, Craig vs. Harney, 331 U. S. 367, 373-4, 67 Sup. Ct. 1249.

A review of the record will demonstrate that a federal right has been denied to the appellant in this case, as the result of findings shown by the record to be without evidence to support them, and that, even if true, such findings are inadequate to support the judgement of the lower court, without consideration of the federal questions here presented, and to base the decree appealed from upon findings of fact, unsupported by the record, would be to deny the appellant due process of law.

The Supreme Court of the United States is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given to a state statute which has been brought in question. Columbia R. Gas & E. Co. vs. South Carolina, 261 U.S. 236, 43 Sup. Ct. 306, Long Sault Development Co. vs. Call, 242 U.S. 272, 37 Sup. Ct. 79, Fisher vs. New Orleans, 218 U.S. 438, 31 Sup. Ct. 57, Louisiana R. & Nav. Co. vs. Behrman, 235 U.S. 164, 35 Sup. Ct. 62, Detroit United R. Co. vs. Michigan, 242 U.S. 238, 37 Sup. Ct. 87, Cross Lake Shooting & Fishing Club vs. Louisiana, 224 U.S. 632, 32 Sup. Ct. 577.

Where a substantial federal claim has been duly raised and necessarily denied by the highest state court, the Supreme Court of the United States has jurisdiction and will decide the

case on its merits. Cities Service Gas Co. vs. Peerless Oil & Gas Co., ...? U.S. ....?, 71 Sup. Ct. 215.

In fact, one of its most recent decisions was handed down in a case involving a criminal conviction under a state statute, where the state court of appeals merely declined to review the case under its normal appellate power, and further declined to review it on certiorari, stating that the issues were not "matters of public interest" which made review desirable. Niemotko vs. Maryland, ...? U.S. ....?, 71 Sup. Ct. 325 (327).

II.

ALTHOUGH THE NOTES AND WARRANTS WERE HELD TO BE UNCOLLECTIBLE, THE DECREE ACTUALLY TURNED UPON THE FEDERAL QUESTION.

Grounds 2, 3 and 4 of the motion of appellees to dismiss or affirm, embraced in their statement of non-jurisdiction, are all to the same effect, that is to say, that since the decree of the state court held the notes and warrants, issued by the drainage district, now held by the appellant, to be void and uncollectible, the decree did not turn upon the asserted federal question.

In presenting these grounds, and throughout the argument set out in their Statement of Non-Jurisdiction and Motion to Dismiss or Affirm, appellees have seen fit to disregard and completely ignore the law of the case, as contained in the earliest opinion filed in this case (See typewritten pages 7 and 8 of Appendix F to the appellant's Statement as to jurisdiction), where it is said:

"It is obvious that this is not primarily a suit upon the notes and warrants now in the hands of the appellant, but that it is one by him, in lieu of the district, to foreclose the liens which the district has failed to foreclose, and that the description of the indebtedness in the bill served principally to show that he is qualified to bring the action under Section 25, supra. It should be borne in mind that the answer with which we are

dealing is not one of the district, but of the owners of land on which the drainage taxes have not been paid.

* * * * * * *

"(5) We see no reason to discuss the several notes and warrants with respect to the manner and time execution, as we are convinced that all were not invalid, if any of them were, and if any one of them was valid, appellant was qualified to sue, for, again quoting Section 25 of Chapter 14,736, supra, 'the holder of any bond or * * * note' may institute foreclosure."

And we might add that, even if all of the notes and warrants were void, the obligation of the district, implied by law, to pay for the services and construction work performed for its benefit, and to repay money which it borrowed and used for its legitimate purposes, still remains, and can be enforced in the courts, under the doctrine of unjust enrichment.

Thus we see that "the State ground," so-called, is not "sufficient to sustain the judgement," and that the judgement should be reviewed on the federal grounds raised by the appellant.

Indeed, the Certification of the Florida Supreme Court as to the Raising and Deciding of Specific Federal Questions certifies that it became and was both material and necessary to the determination of this cause in that court to determine the federal constitutional questions asserted by the appellant and that the federal questions were determined adversely to the appellant.

This certification was made a part of the record and of the judgement of affirmance entered by the Florida Supreme Court.

In discussing Grounds 2, 3 and 4 of the motion of appellees to dismiss or affirm, we invite attention to the statement, found at typewritten page 13 of their statement of non-jurisdiction, to the effect that "But when it was determined that the plan could never be completed, and it was therefore abandoned without benefiting defendants' lands, *the only thing*

that could be constitutionally done was to make new levies against lands in the district, taking into consideration the incompleteness of the plan of reclamation, and apportioning benefits against the several parcels of land according to what they had respectively received from the partial construction of the plan. That is exactly what the Acts of 1935 required, *and without such legislation the district's obligation, then assumed to be valid, could never be paid.*" (Emphasis supplied)

So it is, that even the appellees themselves admit, as was held by the state courts, that if the 1935 legislation, which we contend is unconstitutional, as construed and applied in this case, had been complied with, the appellant could have collected the notes and warrants held by him.

This is tantamount to an admission that the holding of the state courts actually did turn upon the construction and application of the 1935 legislation here assailed by the appellant as being unconstitutional.

In finding number 7 of the decree of the Circuit Court it is said that "In the present case the legislative acts of 1935 provided a method for adjusting assessments against all lands in old Istokpoga District according to benefits actually received up to 1935. The Supervisors and note holders, of which the plaintiff was one, at that time had an opportunity to insist upon an adjusted assessment of benefits and annual levies based thereon but they passed that opportunity up * * *."

So it is readily seen that, notwithstanding the so-called finding that the notes and warrants are uncollectible, the decree actually turned upon the question of the constitutional validity of the 1935 legislation here assailed.

Where a conclusion of a state court as to a federal right and a finding of fact by a state court are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts, the jurisdiction is plain. Fiske vs Kansas, 274 U.S. 380, 385-6, 47 Sup. Ct. 655, Creswill vs. Grand Lodge, 225 U.S. 246, 261, 32 Sup. Ct. 822, Sterling vs. Constantin, 287 U.S. 378, 398, 53 Sup. Ct. 190.

Where the non-federal ground is so interwoven with other grounds as not to be an independent matter, the jurisdiction is plain. Enterprise Irrigation District vs. Farmers Mutual Canal Co. 243 U.S. 157, 164, 37 Sup. Ct. 318.

III.

THERE IS NO CONTRACT BETWEEN A TAXING DISTRICT AND ITS LANDOWNERS, WHICH CAN BE IMPAIRED, IN THE CONSTITUTIONAL SENSE, BY THE BRINGING OF A LAWSUIT, AND DUE PROCESS HAS BEEN AFFORDED TO THE LANDOWNERS.

Ground 5 of appellees' motion to dismiss or affirm asserts that to collect the annual tax levies of 1926, 1927 and 1928, which the appellant seeks to do, would violate due process of law (and obligation of contract between the district and the defendant landowners), since the assessments were based upon the benefits "that will accrue" to each tract of land "from carrying out and putting into effect 'the plan of reclamation' theretofore adopted," citing Section 1463, Compiled General Laws of Florida, Volume 1, page 504, and the plan was never completed.

It would appear that this asserted ground is merely a diversionary tactic designed to draw attention away from the basic question involved in this appeal.

Surely this must be the first time this court has ever encountered the intimation that there is a contract relation existing between a public taxing district and its landowners, and that such a contract, even if it existed, could be impaired in the constitutional sense, by the bringing of a lawsuit for the purpose of enforcing the lien of delinquent taxes due and owing to the district.

That the institution of a court action is not the enactment of a law is a proposition so clearly apparent that no authorities need be cited in its support.

So we pass immediately to a discussion of due process.

The Istokpoga Sub-Drainage District was organized under the General Drainage Law of Florida, the decree of the Circuit Court establishing the district being dated September 9, 1924.

The General Drainage Law is set out in Sections 1098 to 1152, inclusive, Revised General Statutes of Florida, 1920, Volume 1, pages 656-700.

The General Drainage Law, with amendments, became Sections 1451 to 1522, inclusive, Compiled General Laws of Florida, 1927, Volume 1, pages 495-541.

The General Drainage Law, with amendments, subsequently became Sections 298.01 to 298.81, inclusive, Florida Statutes, 1941, Volume 1, pages 1092-1119.

The creation of the Istokpoga Sub-Drainage District and all things done in and about or leading up to its creation were validated and confirmed by Chapter 10,700, Laws of Florida, Special Acts of 1925, Volume 2, page 2113.

A plan of reclamation was adopted and commissioners were appointed to assess the benefits to the lands in the Istokpoga Sub-Drainage District by reason of the execution of the plan of reclamation.

The commissioners assessed the benefits and made their report of such assessment, which report, after notice, was confirmed by the Circuit Court.

Chapter 11,539, Laws of Florida, Acts of 1925, Extraordinary Session, page 1213, validated the assessment of benefits and declared the amount assessed against each parcel of land to be a lien against the land for the amount of such assessment.

Such an act has the force and effect of "a legislative determination of the benefits assessed against the lands of the appellees, and that such benefits exceed the amount of the assessments made and were properly entered against the lands." Dover Drainage District vs. Pancoast, 102 Fla. 267, 135 So. 518.

The Board of Supervisors, at a meeting held on January 28, 1926, determined that ten per cent of the total benefit assessment should be levied as a tax against the land in the district, plus an additional amount of ten per cent of the amount so levied, the aggregate amount of tax necessary to be levied, in the opinion of the board, being $3,086,536.00, and determined that it would be necessary to levy each year, beginning with the year 1926, for the first five years, three per cent of the total tax levied.

At a meeting of the Board of Supervisors held on April 1, 1926, the drainage tax record, prepared in accordance with the General Drainage Law, was submitted to and examined by the board, and found to be in the form required by law, and it was found that the taxes that were theretofore levied against the lands were apportioned to and levied on each tract of land in the district in proportion to the benefits assessed and not in excess thereof.

The Board of Supervisors, at a meeting held on October 27, 1926, determined, ordered and levied three per cent of the total tax theretofore levied on each piece or parcel of land as an annual installment against the land for 1926.

The tax books for the annual tax levies for 1926, 1927 and 1928 were made and filed in accordance with the General Drainage Law.

It will be noted that the taxes levied for each of the years 1926, 1927 and 1928 were only three per cent of the total amount assessed against the several parcels of land, plus an additional amount of ten per cent of the amount so levied, which makes the aggregate of the taxes so levied the equivalent of only about one-tenth of the amount assessed against each parcel of land.

To contend that the enforcement of a small percentage of the benefits assessed against the various tax-delinquent parcels of land is a denial of due process, because of the fact that the project was not 100 per cent completed, is absurd.

The appellees' own Statement of Non-Jurisdiction shows (at typewritten page 7) that the plan of reclamation was more than thirty per cent completed, that is to say that 1,342,000 cubic yards were excavated out of a total of 4,250,000 cubic yards contemplated by the plan of reclamation.

What is a denial of due process is the cancelling out of these taxes by the 1935 legislation here assailed by the appellant.

For he has acquired a vested right in them, State ex rel Neafie vs. Board of Commissioners of Everglades Drainage District, 139 Fla. 559, 190 So. 712, text 719, and these reclamation taxes, based on the assessment of benefits, are his only source of payment, State ex rel Vans Agnew vs. Johnson, 112 Fla. 7, 150 So. 111, Campbell vs. State ex rel Garrett, 124 Fla. 244, 168 So. 33.

If the contention of the appellees is sound, it would always be possible to evade payment of drainage district taxes and to defeat all efforts to enforce such taxes, by the simple expedient of refusing to pay them. For, since a drainage district has no way to raise money except to collect taxes, and since it cannot complete the project except by collecting them, the plan of reclamation never could be completed; hence, no drainage tax liability could ever be enforced.

Indeed, the appellees seem to be aware of the absurdity of their position, for they concede in their Statement of Non-Jurisdiction (at typewritten page 13) that the law would have allowed the collection of the annual tax levies to pay for the construction of the plan of reclamation "while construction was in progress."

It is submitted that the due process of law, whereby these drainage taxes, which are now delinquent, became a lien on the lands of the appellees, was accorded to the landowners as the matter progressed. And the due process of law by which they are now sought to be enforced is the same as that which would have had to be employed in enforcing them "while construction was in progress."

IV.

THERE IS NO MERIT IN THE CONTENTION THAT THE FEDERAL QUESTIONS ARE BASED ON LOCAL STATUTES, APPLICABLE TO ONLY ONE DISTRICT, "NOW DEAD," AND ARE NOT OF SUBSTANTIAL GENERAL INTEREST.

Ground 6 of appellees' motion to dismiss or affirm states that the asserted federal questions are based solely upon local statutes, applicable to only one drainage district, which appellees assert is "now dead," hence they say the case is not of general or public interest and the question is not substantial.

Appellees readily concede, however, that the Istokpoga Sub-Drainage District was formed under the General Drainage Law of the State of Florida.

The fact that a plan of reclamation was adopted under the General Drainage Law is not denied.

The fact that the assessment of benefits was made and confirmed under that law is not denied.

And the fact that the Board of Supervisors determined that ten per cent of the total benefit assessment should be levied as a tax against the land in the district, plus an additional amount of ten per cent of the amount so levied, and that it would be necessary to levy each year, beginning with the year 1926, for the first five years, three per cent of the total tax levied, all of which was done under the General Drainage Law, is not denied.

Nor is it denied that the Board of Supervisors found that the taxes levied were apportioned to and levied on each tract of land in the district in proportion to the benefits assessed and not in excess thereof.

Neither is it denied that the Board of Supervisors determined, ordered and levied three per cent of the total tax theretofore levied on each piece or parcel of land as an annual installment of tax against the land for 1926.

The fact that tax books for the annual tax levies for 1926, 1927 and 1928 were made and filed is not denied.

All this was done under the General Drainage Law.

The question whether the State Legislature, after indebtedness payable out of the taxes levied under the General Drainage Law, based on the assessment of benefits made under the General Drainage Law, can cancel out, by legislative fiat, the taxes so levied, and leave the creditor with no source of payment, is a substantial federal question and is a question of general public interest.

And that is exactly what Chapters 17,072 and 17,073, as construed and applied by the State Courts, have attempted to do.

The General Drainage Law has been on the statute books since 1913.

It is one of the most useful instrumentalities employed in reclaiming swamp and overflowed lands and converting them into improved farms, groves and pasture lands.

Millions of acres have been brought into production in that way.

All of these drainage projects have had to be financed with borrowed money.

Millions of dollars of indebtedness of such districts are outstanding.

The Reconstruction Finance Corporation alone has invested more than $10,000,000.00 in Florida drainage districts.

The intimation that this particular district is "now dead" is not borne out by the record.

Indeed the appellees' own "Statement of Non-Jurisdiction" (typewritten page 7) states that the Board of Supervisors let a contract to one Morgan for the excavation of 3,143,196 cubic yards of earth, of which 1,342,000 cubic yards were excavated, and the record clearly shows that the district is still very much alive and is an active reclamation project.

The creation of the Istokpoga Sub-Drainage District and all things done in and about and leading up to its creation were validated and confirmed by Chapter 10,700, Laws of Florida, Special Acts of 1925, Volume 2, page 2113, and it has never been abolished.

Additional powers were conferred upon it by Chapter 10,692, Laws of Florida, Special Acts of 1925, Volume 2, pages 2098-2100.

Chapter 11,539, Laws of Florida, Acts of 1925, Extraordinary Session, page 1213, validated the assessment of benefits and declared the amount assessed against each parcel of land to be a lien against the land for the amount of such assesment.

Such an enactment has the force and effect of "a legislative determination of the benefits assessed against the lands of the appellees, and that such benefits exceed the amount of the assessments made and were properly entered against the lands." Dover Drainage District vs. Pancoast, 102 Fla. 267, 135 So. 518.

Chapter 13,671, Laws of Florida, General Acts of 1929, Volume 1, page 273, provided for the issuance of refunding bonds by the district.

Chapter 14,736, Laws of Florida, General Acts of 1931, Volume 1, page 359, consolidated the Istokpoga Sub-Drainage District and another existing district known as the Indian Prairie Sub-Drainage District, together with certain additional lands, into the Istokpoga Consolidated Sub-Drainage District.

Chapter 14,736 provided, among other things, that the Istokpoga Consolidated Sub-Drainage District was thereby vested with all the rights, powers and privileges given to drainage districts under the laws of Florida.

It did not purport to cancel any outstanding indebtedness of the Istokpoga Sub-Drainage District.

It provided for the taking over of the assets of the two former districts, and required the keeping of separate records for the territory formerly embraced in the two old districts, so long as there shall be any outstanding indebtedness of either district.

Section 18 specifically provided that all legal and binding contracts then in force are "hereby recognized and shall remain in full force and effect, and hereby is declared to be the

binding obligation of Istokpoga Consolidated Sub-Drainage District."

Chapter 17,072, Laws of Florida, General Acts of 1935, Volume 1, page 671, and Chapter 17,073, Laws of Florida, General Acts of 1935, Volume 1, page 672, both recognized the Istokpoga Consolidated Sub-Drainage District as being still in existence.

The same is true of Chapter 22,735, Laws of Florida, General Acts of 1945, Volume 1, page 404, Chapter 22,875, Laws of Florida, General Acts of 1945, Volume 1, page 919, and Chapter 22,878, Laws of Florida, General Acts of 1945, Volume 1, page 929.

Since the Florida Legislature meets only once in every two-year period, unless called into extraordinary session, it is apparent that there have been but few legislative sessions since the establishment of Istokpoga Sub-Drainage District that have not recognized the continued existence of the original district, or its successor, Istokpoga Consolidated Sub-Drainage District.

The record in this case shows that, after this action had been instituted, a tax settlement, in which some of the land-owning appellees in this case participated, was put through, whereby approximately $380,000.00 in principal and interest on Indian Prairie Sub-Drainage District bonds were surrendered and were received by the Istokpoga Consolidated Sub-Drainage District in complete settlement and satisfaction of the entire drainage tax debt on the lands involved in such settlement, but not involved in this action, including the liability of such lands for the Istokpoga Consolidated Sub-Drainage District debt, in an aggregate amount of over $400,000.00. (See typewritten transcript page 705, plaintiff's Exhibit A-119).

This settlement in which some of the appellees participated would seem to completely refute their contention that the district is "now dead."

Reference has already been made to the fact that the appellees themselves concede that more than thirty per cent

of the excavation work contemplated by the plan of reclamation was completed.

The record shows that the main canal controlling the level of the water in Lake Istokpoga, which was planned to extend from the Kissimmee River to Lake Istokpoga, for a distance of approximately six and one-half miles, with a designed width of 165 feet at the top and 125 feet at the bottom, was about 77 per cent completed, that work was commenced on another canal, known as the slough canal, and was about 31 per cent completed. Substantial benefits accrued as a result of this drainage work to the area as a whole, since the partial completion of the main canal lowered the level of Lake Istokpoga, thereby laying the basis for the vast development which has occurred in the area, and which would not have been possible in the absence of this basic drainage work. At one time, the Istokpoga Consolidated Sub-Drainage District obtained some assistance from the Federal Civil Works Administration, with which, together with some dragline work financed by the district itself, additional connections were made from the main canal to Istokpoga Creek, thereby establishing drainage through the main canal of approximately 1,000 cubic feet per second or about 50 per cent of the estimated and planned total drainage. Due to this later work, which made more effective the previous excavation work, the drainage district area immediately began to develop, so that at the present time the area contains approximately nine or ten miles of railroad, four vegetable packing houses, a number of miles of hard-surfaced road, approximately 2,000 acres of vegetable farms, a considerable number of thousands of acres of improved pastures, planted with improved pasture grasses, and many thousands of acres available for cattle pasture that had not been previously available. (See testimony of R. A. Carlton, typewritten transcript pages 606-615, H. O. Sebring, page 654, et seq., and Bruce G. Leighton, page 729, et seq.).

Thus it is clearly seen that the alleged death of the district has been "greatly exaggerated," that the case is of general public interest, and that the federal question is substantial.

V.

THE CONTENTION THAT A REVIEW COULD ONLY RESULT IN AFFIRMANCE IS NOT WELL-FOUNDED.

It seems to be the position of appellees (as expressed at typewritten page 14 of their statement of non-jurisdiction and motion to dismiss or affirm) that the Florida Supreme Court opinion filed August 1, 1950 (Appendix C to appellant's statement as to jurisdiction), indicates the reasons prompting that court to affirm the chancellor's decree.

Apparently, appellees are referring to the statements in that opinion to the effect that the evidence in regard to the appellant's "inequitable deportment * * * filled hundreds of pages of the record," that "we find nothing that does or should cause us to take the view that the Chancellor should not have believed it," and that "his findings of fact were replete with his conviction that the conduct of Westervelt was so reprehensible and unconscionable that he should not be permitted to recover," followed by the observation that "with these findings we do not disagree."

But Appendix A and Appendix B to appellant's statement as to jurisdiction show that the opinion of August 1, 1950 was "withdrawn" and that the opinion of December 8, 1950, containing the one word "affirmed," was substituted in its place.

The typewritten transcript of the record, certified to by the Clerk of the Florida Supreme Court, clearly shows that the withdrawal of the opinion of August 1 and the substitution of the opinion of December 8, containing the one word "affirmed," were brought about by appellant's petition for rehearing, his amendment to his petition for rehearing, and his motion for modification of the opinion of August 1, all of which insisted that a further study of the record would clearly show that there was no basis for the chancellor's "conviction" of appellant of any such conduct as bars enforcement of the tax liabilities sought to be foreclosed in this action.

The Florida Supreme Court must have become convinced, upon reexamination of the record, that it did not support the chancellor's findings or "conviction" on this point, for otherwise it would not have receded from the position expressed in the opinion of August 1, 1950, and would not have entered its certification as to the raising and deciding of constitutional questions, which certification was made a part of the record and of the judgement of affirmance.

By its action in simply "affirming" the final decree of the Circuit Court, without more, is it not manifest that the Florida Supreme Court, after again reviewing the record, did not "go along" on the so-called findings of fact?

In any event, it is apparent that the state court's conclusions of law, as to appellant's federal constitutional rights, and the findings of fact, are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

An examination of the record in this case and of the decree of the state court will reveal a most remarkable decree, wholly unsupported in fact or in law, whereby the appellant's contractual rights have been destroyed and he has been denied due process of law.

We respectfully submit that the Supreme Court of the United States should take jurisdiction of this cause, and should review the decree of the state court and the record upon which it is purportedly based, and should reverse the decree appealed from.

Respectfully submitted,

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MAY 14, 1951.

Per Curiam Decision.

No. 648. WESTERVELT *v.* ISTOKPOGA CONSOLIDATED SUBDRAINAGE DISTRICT ET AL. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *D. C. Hull, Erskine W. Landis, John L. Graham* and *J. Compton French* for appellant. *O. K. Reaves, David E. Ward* and *Doyle E. Carlton* for appellees. Reported below: 49 So. 2d 341.